CLERK'S COPY.

Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 485)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 14

LLOYD C. DUNCAN, PETITIONER,

vs.

DUKE PAOA KAHANAMOKU, SHERIFF OF THE CITY AND COUNTY OF HONOLULU

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1944.

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United States

Circuit Court of Appeals

For the Ninth Circuit.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,

Appellant,

vs.

LLOYD C. DUNCAN,

Appellee.

Transcript of Record

In Three Volumes

VOLUME I

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Rotary Colorprint, 590 Folsom St., San Francisco

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and performance of their official duties as sentries at the Main Gate, Navy Yard, Pearl Harbor, T. H., contrary to General Orders #2, Par. 8.01 of the Military Governor, Territory of Hawaii. (10 March 1943).

(Signature of Accuser)

LT. (jg) GENE A. TRINI

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 29 day of February A.D. 1944, and made oath that he is a person subject to military law and that he personally signed the foregoing charge and had investigated the matters set forth in the charge, and that the same are true in fact, to the best of his knowledge and belief.

ARTHUR L. MUNDO
Lt. Cmdr., U. S. Navy (Ret)
Provost Court
Case No. P. H. 650-44

The Charge	Plea	Findings	Sentence or Acquittal or Remarks
Forgoing			

Pearl Harbor, T.H. 29 February 1944

ARTHUR L. MUNDO
Lt. Cmdr., U. S. Navy (Ret)
Provost Court [10]

EXHIBIT B

Mitt. Number PH 6-44
Case Number PH 650-44
Pearl Harbor
Provost Court of City and County of Honolulu
Territory of Hawaii

MITTIMUS

The Territory of Hawaii:

To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu, or his Deputy;

LLOYD CLIFFORD DUNCAN

having been convicted in the Provost Court of Pearl Harbor, City and County of Honolulu, of the Offense of, to wit:

General Order #2 Paragraph 8.01

The Lloyd Clifford Duncan, at Pearl Harbor T.H., on the 24th day of February 19, 1944, did unlawfully, wilfully and maliciously assault, strike, beat and ill treat Robert C. Bowerman, Corporal USMC, and J. C. Hunter, pfc, USMC, with intent to resist, prevent, hinder and obstruct the said Robert C. Bowerman and J. C. Hunter in the lawful discharge, execution and performance of their official duties as sentries at the Main Gate, Navy Yard, Pearl Harbor, T.H., contrary to General Orders #2 Paragraph 8.01 of the Military Governor of the Territory of Hawaii (10 March 1943)

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Petitioner, Lloyd C. Duncan,

J. GARNER ANTHONY, Esquire, of the firm Robertson, Castle & Anthony,
Castle & Cooke Building, Honolulu, T. H.

For the Respondent, Duke Paoa Kahanamoku, Sheriff, City and County of Honolulu, Territory of Hawaii.

G. D. CROZIER, Esquire, United States District Attorney, District of Hawaii,
Federal Building, Honolulu, T. H.

EDWARD A. TOWSE, Esquire, Assistant United States District Attorney, District of Hawaii,
Federal Building, Honolulu, T. H.

EDWARD J. ENNIS, Esquire, Special Assistant to the Attorney General of the United States,
Washington, D. C.

LIEUT. COL. WILLIAM J. HUGHES, Jr.,
Judge Advocate General's Department,
Washington, D. C.

LIEUT. COL. EUGENE V. SLATTERY,
Office of the Military Governor,
Honolulu, Hawaii. [1*]

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* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

In the United States District Court
For the Territory of Hawaii

Habeas Corpus No. 298

In the Matter of the Application of
LLOYD C. DUNCAN
For a Writ of Habeas Corpus.

CLERK'S STATEMENT

Time of Commencing Suit:
March 14, 1944
Petition filed

Names of Original Parties:
Lloyd C. Duncan, Petitioner
Duke Paoa Kahanamoku, Respondent

Dates of Filing Pleadings:
March 14, 1944
Petition filed
March 14, 1944
Order to Show Cause issued
March 20, 1944
Motion for an order granting time within which to file return, answer or otherwise plead to order to show cause filed
March 29, 1944
Return and Answer to Order to Show Cause filed
April 4, 1944
Traverse
March 31, 1944
Writ issued

Date of Filing Findings and Conclusions
April 13, 1944
Findings and Conclusions filed

Date of Filing Judgment
April 20, 1944
Judgment filed

Proceedings in the above entitled matter were had before the Honorable J. Frank McLaughlin and the Honorable Delbert E. Metzger, District Judges.

[2]

Dates of Filing Appeal Documents:
April 20, 1944
Exceptions to Findings and Conclusions
Order on Taking Appeal
Notice of Appeal

April 26, 1944
Respondent Appellant's Designation of Record

April 27, 1944
Petitioner's Counter Designation of Record
Release of Petitioner on his Own Recognizance

CERTIFICATE OF CLERK AS TO THE ABOVE STATEMENT

United States of America
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii,

do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above entitled cause; the names of the original parties; the several dates when respective pleadings were filed; the date the Findings and Conclusions was filed; the date the Judgment was filed; the names of the judges presiding and the dates when appeal documents were filed in the above entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this day of April, A. D. 1944.

WM. F. THOMPSON, JR., Clerk,
U. S. District Court,
Territory of Hawaii. [3]

[Title of District Court and Cause.]

PETITION

To the District Court of the United States for the Territory of Hawaii,

Comes now Lloyd C. Duncan, petitioner above named and respectfully shows as follows:

I.

That petitioner is a citizen of the United States of America and of the State of Wyoming and is temporarily living in the Territory of Hawaii and is employed as a civilian worker at Pearl Harbor, Island of Oahu, T. H.;

II.

That respondent, Duke Paoa Kahanamoku, is the duly elected, qualified and acting sheriff of the City and County of Honolulu and as such has the custody of all prisoners detained in the City and County jail situated in the city of Honolulu in the District of Iwilei;

III.

That on the 24th day of February 1944, petitioner was lawfully on the U. S. Naval Reservation at Pearl Harbor, Oahu, T.H., about to report to his work on said reservation, at which time and place petitioner had a trivial argument with a U.S.M.C. sentry at the main gate on the matter of [5] transportation and as a result of which the said sentry assaulted petitioner and placed him under arrest; that thereafter petitioner was turned over to the civil police, held in custody until the following day and was then discharged; that on or about February 29, petitioner was summoned to appear before a tribunal known as the "Provost Court of Pearl Harbor, City and County of Honolulu"; that on March 2, 1944, petitioner was tried before said provost court, Arthur L. Mundo, Lt. Comdr., USN (Ret.) upon the false charge that petitioner assaulted two U.S.M.C. sentries (who at the time and place in question were fully armed with sidearms and clubs) with intent to obstruct them in the performance of their duties; a copy of which charge is hereto attached, made a part hereof and marked Exhibit A;

IV.

That on March 2, 1944, petitioner was tried before the aforesaid provost court without counsel and was found guilty of said charges by Arthur L. Mundo, Lt. Comdr., USN (Ret.) and was sentenced to be imprisoned in the City and County of Honolulu jail for a term of six months; that a copy of the mittimus delivered to the sheriff of the City and County of Honolulu ordering said Sheriff to execute said sentence is hereto attached, made a part hereof and marked Exhibit B;

V.

That the trial and conviction of petitioner before said provost court was not in accordance with the Constitution and the laws of the United States or the laws of the Territory of Hawaii and is null and void; that notwithstanding the [6] unlawful trial and conviction of petitioner as aforesaid petitioner is imprisoned and restrained of his liberty by the said Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, acting under color of authority of the United States of America;

VI.

That petitioner is now unlawfully imprisoned under color of authority of the United States in violation of the Constitution and laws of the United States; that City and County jail in which said prisoner is confined is situated less than twenty miles from the courtroom of this Honorable Court;

VII.

That on December 7, 1941, the Governor of Hawaii pursuant to Section 67 of the Hawaiian Organic Act by proclamation placed the Territory of Hawaii under martial law; that the Governor of Hawaii on February 8, 1943, issued a proclamation which substantially restored civil authority in the Territory of Hawaii, copies of said proclamations are hereto attached, made a part hereof and marked Exhibits C and D respectively; that although the factual situation on December 7, 1941 and for a short time thereafter justified the executive determination that Hawaii was in imminent danger of invasion, that circumstance, long prior to the unlawful trial and conviction of petitioner had passed; that for more than a year last past all civil authorities both Federal and Territorial including the civil and criminal courts of the United States and of the Territory of Hawaii have been functioning in accordance with law; that for more than a year last past there has existed no real or apparent threat of invasion of Hawaii and accordingly the [7] state of martial law does not now lawfully exist within the Territory of Hawaii;

VIII.

The irrespective of the existence or non-existence of a state of martial law within the Territory of Hawaii, at the time of petitioner's trial (March 2, 1944) by the provost court there existed no military necessity for the trial of petitioner, a civilian, for the offense of assault and battery before a military tribunal and there was and is no justification

for denying petitioner the kind of a trial which is guaranteed to him under the Constitution and laws of the United States.

Wherefore, your petitioner prays that a writ of habeas corpus be issued out of this Honorable Court directed to Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, commanding him to produce the body of Lloyd C. Duncan before this court at a time and place therein to be specified, then and there to receive and do what this court shall order concerning the detention and restraint of the said Lloyd C. Duncan; that the said Lloyd C. Duncan be ordered discharged from the detention and imprisonment aforesaid.

Dated: Honolulu, T. H., March 14, 1944.

/s/ LLOYD C. DUNCAN

Territory of Hawaii,
City and County of Honolulu—ss.

Lloyd C. Duncan, being first duly sworn on oath deposes and says that he is the petitioner in the above entitled action; that he has read the petition, knows the contents thereof and that the same are true.

/s/ LLOYD C. DUNCAN

Subscribed and sworn to before me this 14 day of March, 1944.

/s/ CHARLES Y. AWANA
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1945. [8]

NOTICE

To G. D. Crozier, United States Attorney:

Please take notice that the foregoing application of Lloyd C. Duncan for a writ of habeas corpus will be heard before the Honorable J. Frank McLaughlin, United States District Judge in his court room at 2 o'clock P. M. on March 14th, 1944.

/s/ GARNER ANTHONY,
Attorney for petitioner. [9]

EXHIBIT A

Provost Court Proceedings
In Session
Pearl Harbor, T. H., 29 February 1944

Name of accused: Lloyd Clifford Duncan, #116086
Residence:
Citizenship: USA Age: Where Employed:
Descent: (father) (Mother)
Witness for Prosecution:
Witnesses for Accused:
Copy of charge furnished accused.
Documentary Evidence:
Arresting Officer: Cpl. Bowerman, USMC
Charge: General Orders #2, Paragraph 8.01

That Lloyd Clifford Duncan, at Pearl Harbor, T. H., on the 24th day of February, A. D., 1944, did unlawfully, wilfully and maliciously assault, strike, beat and ill treat Robert C. Bowerman, Corporal, U.S.M.C. and J. C. Hunter, PFC, U.S.M.C., with intent to resist, prevent, hinder and obstruct the said Robert C. Bowerman and J. C. Hunter in the lawful discharge, execution

Building, Honolulu, Territory of Hawaii, is hereby waived.

ROBERTSON, CASTLE & ANTHONY
By GARNER ANTHONY (Signed)
Attorneys for Petitioner

[Endorsed]: Filed March 20, 1944. [22]

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor;

It Is Hereby Ordered that the motion of Duke Paoa Kahanamoku, Respondent in the above entitled proceeding for an enlargement of time within which to file a return, answer or otherwise plead to the Order to Show Cause heretofore issued in the above entitled proceeding is hereby granted; and the said Respondent is hereby allowed until 10:00 a. m. Friday March 31, 1944, to file a return, answer or otherwise plead to the Order to Show Cause.

Dated: Honolulu, T. H., this 20th day of March, 1944.

(Signed) DELBERT E. METZGER,
Judge United States District Court for the Territory of Hawaii

[Endorsed]: Filed March 20, 1944. [24]

[Title of District Court and Cause.]

RETURN AND ANSWER TO ORDER TO SHOW CAUSE

To The Honorable Delbert E. Metzger, Judge Of The United States District Court In And For The Territory of Hawaii:

Comes now Duke Paoa Kahanamoku, as Sheriff of the City and County of Honolulu hereinafter referred to as the respondent, and in return and answer to the order to show cause in the above-entitled matter on March 14, 1944, upon him duly served at 9:05 A.M., March 15, 1944, and in answer to the petition heretofore filed in said matter by said Lloyd C. Duncan, upon which said order to show cause was made, respectfully states that he has in his custody the said Lloyd C. Duncan, denies that he unjustly, unlawfully, and without cause imprisons or restrains the petitioner, Lloyd C. Duncan, of his liberty, makes the following answer, represents, alleges, admits and denies, and shows cause, as follows, to wit:

I.

As to paragraphs 1 to 8 inclusive in said petition contained the respondent admits and d e n i e s, a s follows:

1.

Respondent admits the allegations contained in paragraph I of the petition. [26]

and by said Court on this day sentenced to be imprisoned in the Honolulu Jail for the term of

Six (6) Months

and to pay a fine of XXXXX XXXXX Dollars, or to be imprisoned in the Honolulu Jail until said Fine be paid:

You Are Ordered to take said Lloyd Clifford Duncan into your custody, and to cause said sentence to be executed. Hereof fail not.

Given Under My Hand This 2nd day of March, A.D. 1944.

(S) ARTHUR L. MUNDO
Arthur L. Mundo
Lt. Cmdr. US Navy (Ret)
Provost Court [11]

EXHIBIT C

Territory of Hawaii

A Proclamation

Whereas, it is provided by Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, that, whenever it becomes necessary, the Governor of that territory may call upon the commander of the military forces of the United States in that territory to prevent invasion; and

Whereas, it is further provided by the said section that the governor may in case of invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus and place the territory under martial law; and

Whereas, the armed forces of the Empire of Japan have this day attacked and invaded the shores of the Hawaiian Islands; and

Whereas, it has become necessary to repel such attack and invasion; and

Whereas, the public safety requires;

Now, Therefore, I, J. B. Poindexter, Governor of the Territory of Hawaii, do hereby announce that, pursuant to said section, I have called upon the Commanding General, Hawaiian Department, to prevent such invasion;

And, pursuant to the same section, I do hereby suspend the privilege of the writ of habeas corpus until further notice;

And, pursuant to the same section, I do hereby place the said territory under martial law;

And, I do hereby authorize and request the Commanding General, Hawaiian Department, during the present [12] emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor;

And I do further authorize and request the said Commanding General, Hawaiian Department, and those subordinate military personnel to whom he may delegate such authority, during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this territory and of the counties and cities therein, and such other and further powers as the emergency may require;

And I do require all good citizens of the United

States and all other persons within the Territor
of Hawaii to obey promptly and fully, in lett
and in spirit, such proclamations, rules, regulatio
and orders, as the Commanding General, Hawaii
Department, or his subordinates, may issue duri
the present emergency.

In Witness Whereof, I have hereunto set m
hand and caused the seal of the Territory of Haw
to be affixed.

Done at Honolulu Territory of Hawaii, this 7
day of December, 1941.

[Seal] (s) J. B. POINDEXTER
Governor of the Territory
Hawaii.

By the Governor:
CHAS. M. HITE
Secretary of Hawaii.
3:30 P.M.

A true and correct copy:
JAMES F. HANLEY
Major, J.A.G.D.

EXHIBIT D

By the Governor of Hawaii
A Proclamation

Feb 8 1943

Whereas, the Governor of Hawaii by his proc
mation of December 7, 1941, placed the Territory
Hawaii under martial law, in exercise of his powe
under section 67 of the Organic Act, which actio

was confirmed by the President of the United States on December 8, 1941; and

Whereas, a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended;

Now, Therefore, I, Ingram M. Stainback, Governor of Hawaii, under the authority given by section 67 of the Organic Act, do hereby proclaim:

1. The Governor of Hawaii and the other civilian officers and agencies of the federal, the territorial and the local governments, will resume on the thirtieth day hereafter their respective jurisdictions, functions and powers, according to law, with respect to the following matters, and others necessarily related thereto:

(a) Control of prices

(b) Rationing of commodities among the civilian population.

(c) Control of hospitals, medical personnel, and medical supplies

(d) Food production by and distribution of food among the civilian population

(e) Control of rents

(f) Control of transportation and traffic by land, except the movement of troops, military supplies and equipment, and except that the Commanding General may prescribe rules for the traffic during blackout hours

(g) Public health, sanitation, and prevention of disease among civilians

(h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations

(i) Judicial proceedings, both criminal and civil, except: [13]

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect of any act or omission certified by the Commanding General to be in the line of duty.

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the Territory or in the United States District Court for Hawaii, as the case may be.

(j) Control of imports for civilian consumption and exports by civilians within allotments of tonnage made by the Commanding General

(k) Censorship of mail from civilians in the Territory

(l) Control of liquor and narcotics

(m) Schools and children

(n) The custody of alien property

(o) Collection and disposition of garbage, ashes, and other waste

(p) Banking, currency, and securities, provided that the Commanding General may proscribe the measures to be taken to prevent the enemy from obtaining securities or money or realizing upon them if he should obtain them

(q) Civilian defense activities, except that the Commanding General shall have jurisdiction to prescribe the duties of the Civilian Defense Corps, and to regulate and inspect their training

(r) Control of the supply, employment, hours, wages, and working conditions of labor, except as to (1) employees of the United States under the War Department or the Navy Department, (2) workers employed on construction and other projects under the War Department or the Navy Department, (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities. It is contemplated that the Commanding General and the Governor of Hawaii by mutual agreement will appoint a joint advisory committee which shall from time to time consult and advise with each of them with reference to labor matters in their respective fields. [14]

2. For the purposes of the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations, the Commanding General shall continue so far as he deems the military security of the Territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are resumed by civil

authorities pursuant to paragraph 1 of this proclamation.

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it necessary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a miltitary emergency, to exercise such of the functions and jurisdictions as are hereby or may hereafter be resumed by the civil authorities, or to issue such additional military orders, after consultation with the Governor of the Territory where civilian rights and the administration of the civilian government are affected, directing such action as in the judgment of the Commanding General may be required for the military security of the Territory.

4. Nothing in this proclamation shall operate to invalidate any conviction, or any application of military orders to persons or activities, or any other action, which occurred or shall occur prior to the thirtieth day hereafter.

5. I call upon all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and spirit, such orders as the Commanding General may issue under this proclamation and during the continuance of the state of martial law.

Done at Honolulu, Territory of Hawaii, this 8 day of Feb, 1943.

INGRAM M. STAINBACK,
Governor of Hawaii. [15]

Attest: A true copy
WM. F. THOMPSON, Jr.,
Clerk, United States District Court, Territory and District of Hawaii.
By /s/ E. C. ROBINSON
Deputy

[Endorsed]: Filed Mar. 14, 1944. [15-a]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon the reading of the verified petition filed in the above cause:

It Is Hereby Ordered that Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, appear before this court on Monday, the 20th day of March 1944 at 10 o'clock A.M. to show cause if any he has why a writ of habeas corpus should not be issued herein as prayed for and that a copy of this order and the petition filed herein be served upon the said Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu.

Dated: Honolulu, Hawaii, March 14th, 1944.
(Signed) J. FRANK McLAUGHLIN
United States District Judge

[17]

United States Marshal's Office.
Marshal's Return.

The within Order to Show Cause was received by me on the 14th day of March, A.D. 1944, and is returned executed this 15th day of March, A.D. 1944 upon Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu at his office in the City Hall at 9:05 a.m. by exhibiting to him the original Order to Show Cause and by handing to and leaving with him a certified copy of this order together with the petition attached thereon.

Dated at Honolulu, T. H. this 15th day of March, A.D. 1944.

OTTO F. HEINE (Signed)
U. S. Marshal, District of Hawaii.

Marshal's Civil Docket
No. 2455
Court No. 298
Fees.....$2.06
Expenses.....
Total.....$2.06

[Endorsed]: Filed Mar 15 1944. [18]

[Title of District Court and Cause.]

MOTION FOR AN ORDER GRANTING ENLARGEMENT OF TIME WITHIN WHICH TO FILE RETURN, ANSWER OR OTHERWISE PLEAD TO ORDER TO SHOW CAUSE

Comes now Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, Territory of Hawaii, Respondent in the above entitled cause, by and through G. D. Crozier, United States Attorney, District of Hawaii, and moves this Honorable Court for an order granting enlargement of time of ten days, to 10:00 a.m. Friday March 31, 1944, within which to file a return, answer or otherwise plead to the Order to Show Cause heretofore issued in the above entitled proceeding.

That this motion made at the request of the Honorable Francis Biddle, Attorney General of the United States, who has informed counsel for Respondent that representatives of the War Department and Department of Justice are being sent from Washington, D. C. to the Territory of Hawaii to participate in this proceeding.

That the enlargement of time of ten days within which to respond to the Order to Show Cause for which this motion is made is deemed necessary to permit arrival and participation of such representatives in this proceeding.

This motion is based upon the files and records of this proceeding and upon the affidavit of G. D. Crozier, United States Attorney, District of Ha-

waii, Attorney for the Respondent hereto attached and expressly made a part hereof.

Dated: Honolulu, T. H., this 20th day of March, 1944.

DUKE PAOA KAHANAMOKU,
Sheriff of the City and County of Honolulu, Territory of Hawaii, Respondent
By G. D. CROZIER (Signed)
United States Attorney
District of Hawaii
Attorney for Respondent.

[20]

AFFIDAVIT

City & County of Honolulu
Territory of Hawaii—ss.

G. D. Crozier, being first duly sworn, deposes and says:

That he is the duly appointed, qualified and acting United States Attorney for the District of Hawaii; that on March 19, 1944, affiant received a radiogram from the Honorable Francis Biddle, Attorney General of the United States, reading as follows:

"Expedite 1690 67 US Gvt—Washington DC
18 532 PASSF
Rapid G. D. Crozier 1944 Mar 18 pm 7:38
United States Attorney Honolulu TH.

Representatives of War and Justice Departments conversant with government policies involved being sent at once to Hawaii to participate in presentation of Government's position in pending Duncan habeas corpus proceeding. Please request ten day adjournment for response to Order to Show Cause now due March twentieth to permit arrival and participation of these representative.

"FRANCIS BIDDLE
Attorney General."

Further affiant sayeth naught.

Dated: Honolulu, T. H., this 20th day of March, 1944.

G. D. CROZIER (Signed)
United States Attorney
District of Hawaii

Subscribed and sworn to before me this 20th day of March, 1944.

THOS. P. CUMMINS (Signed)
Deputy Clerk, United States District Court for the Territory of Hawaii [21]

NOTICE OF MOTION AND WAIVER OF NOTICE

Receipt of a copy of the foregoing motion and affidavit is hereby acknowledged this 20th day of March, 1944 and notice of the hearing thereof at 9:00 a. m. Monday March 20, 1944, before the Honorable Delbert E. Metzger, Judge of the above entitled Court, in his Courtroom in the Federal

sition of Military Governor of the Territory of Hawaii as aforesaid on June 1, 1943.

9.

That the Honorable Ingram M. Stainback, as Governor of the Territory of Hawaii, by proclamation dated February 8, 1943, a copy of which proclamation is attached to this answer as Exhibit "G" and incorporated into this answer by reference thereto as though fully set forth herein, proclaimed that a state of martial law remains in effect and that the privilege of the writ of habeas corpus remains suspended within the Territory [37] of Hawaii; that the respondent is informed and believes and thereupon alleges that the proclamation of the Honorable Joseph B. Poindexter, as Governor of the Territory of Hawaii, made on December 7, 1941, that he had suspended the privilege of the writ of habeas corpus and had placed the Territory of Hawaii under martial law, other than as set forth by the aforesaid proclamation of the Honorable Ingram M. Stainback, made on February 8, 1943, as aforesaid, remains in full force and effect within the Territory of Hawaii; that the respondent is informed and believes and thereupon alleges that the aforesaid proclamation of the Honorable Ingram M. Stainback, as Governor of the Territory of Hawaii, made on February 8, 1943, as aforesaid, that a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended, now is in full force and effect and has been in full force and effect as provided by the

terms and conditions thereof at all times ... the same was made, proclaimed, and issued on February 8, 1943, as aforesaid; that the respondent is informed and believes and thereupon alleges that prior to the issuance of the aforesaid proclamation by the Honorable Ingram M. Stainback, as aforesaid, conferences were held at Washington, D. C., between the Secretary of War, the Attorney General of the United States, Warner W. Gardner, Ingram M. Stainback, Governor of the Territory of Hawaii, Abe Fortas, Undersecretary of the Department of the Interior, Delos C. Emmons, Lieutenant General, The Commanding General, Hawaiian Department, and John J. McCloy, Assistant Secretary of War, at which it was agreed, among other matters, by the aforesaid persons present at said conferences, that the suspension [38] of the privilege of the writ of habeas corpus was to continue within the Territory of Hawaii after the effective date of the aforesaid proclamation of the Honorable Ingram M. Stainback, Governor of the Territory of Hawaii, and that martial law was to continue in force and effect in the Territory of Hawaii after the effective date of the aforesaid proclamation, subject, however, to the provisions of said proclamation; that no recommendation would be made to the President that either the suspension of the privilege of the writ or martial law should be terminated; that the respondent is informed and thereupon alleges that on January 18, 1943, the Secretary of War, the Attorney General of the United States, and the Secretary of the

2.

Respondent admits the allegations in paragraph II of the petition herein.

3.

Respondent denies all allegations contained in paragraph III of the petition herein except such as allege that on the 24th day of February, 1944, petitioner was in and upon the United States Naval Reservation at Pearl Harbor, Territory of Hawaii; that he was there arrested by a United States Marine Sentry; that at the time of said arrest the sentries mentioned in said paragraph III of the petition were armed and possessed clubs; that he was thereafter turned over to civil police, held in custody until the following day and was then released; that on February 29, 1944 petitioner was summoned to appear before the Provost Court of Pearl Harbor, T. H.; that on March 2, 1944, petitioner was tried before said Provost Court, Arthur L. Mundo, Lieutenant Commander, U.S.N. (Ret.) upon the charge set forth in Exhibit "A" as attached to the petition; which the respondent admits.

4.

Respondent admits the allegations contained in paragraph IV of the petition but denies that the charges therein mentioned were false and alleges that the petitioner waived representation by counsel in the said proceedings before the said Provost Court.

5.

The respondent denies all of the allegations contained in paragraph V of the petition excepting

such as allege that petitioner is imprisoned and restrained of his liberty by the respondent pursuant to Exhibit "B" attached to said petition, which the respondent admits. [27]

6.

That respondent denies all of the allegations contained in paragraph VI of said petition excepting such as allege that the Petitioner is imprisoned under color of authority of the United States and that the City and County jail in which said petitioner is confined is situated less than twenty miles from the court room of this Honorable Court which allegation the respondent admits.

7.

Respondent denies the allegations contained in paragraph VII of the petition excepting such as allege that on December 7, 1941 the Governor of the Territory of Hawaii, pursuant to Section 67 of the Hawaiian Organic Act by proclamation placed the Territory of Hawaii under martial law, a true copy of which proclamation is attached to the petition as Exhibit "C"; except such as allege that the Governor of Hawaii on February 8, 1943, issued a proclamation, a true copy of which proclamation is attached to the petition and marked Exhibit "D"; except such as allege that the factual situation on December 7, 1941 and thereafter justified the executive determination that Hawaii was in imminent danger of invasion; and except such as allege that for more than a year last past all civil authorities both Fed-

eral and Territorial including the civil and criminal courts of the United States and of the Territory of Hawaii have been functioning in accordance with the Constitution and the laws of the United States and with the laws of the Territory of Hawaii; which allegations the respondent admits.

8.

That with respect to the allegations contained in paragraph VIII of the petition, the respondent denies that the offense for which the petitioner was tried on [28] March 2, 1944, by the Provost Court in said petition elsewhere mentioned was for the offense of assault and battery, but affirmatively alleges that the offense for which the petitioner was so tried at said time before said court was for the offense of unlawfully, wilfully, and maliciously assaulting, striking, beating and ill-treating two Marine sentries at the Main Gate, Navy Yard, Pearl Harbor, T. H., with intent to resist, prevent, hinder and obstruct the said sentries in the lawful discharge and execution and performance of their official duties as sentries at the Main Gate, Navy Yard, Pearl Harbor, T. H., contrary to General Orders No. 2, Paragraph 8.01, of the Military Governor of the Territary of Hawaii dated March 10, 1943. Respondent alleges that at said trial petitioner interposed no objection to being tried by said Provost Court but stated in answer to a question by the Court that he was ready to proceed and in the course of the trial testified in his own behalf.

Respondent further affirmatively alleges that

there was military necessity and justification for the trial of petitioner by said Provost Court on the above-mentioned charge on March 2, 1944;

That other than stated as aforesaid in this paragraph the allegations of Paragraph VIII are denied by the respondent.

II.

And for cause why the writ of habeas corpus prayed for in the petition herein should not be issued and granted, respondent affirmatively alleges as follows:

1.

That the respondent, Duke Paoa Kahanamoku, now is at times mentioned and stated in this return and answer [29] was the duly elected, qualified, and acting Sheriff of the City and County of Honolulu, a municipal corporation of the Territory of Hawaii.

2.

That on February 8, 1941, Walter C. Short, Lieutenant General, United States Army, having theretofore been duly designated by the War Department of the United States as The Commanding General, Hawaiian Department, duly assumed command of the Hawaiian Department and was the duly appointed, qualified, and acting Commanding General of the Hawaiian Department, and duly was in command of the military forces of the United States in the Territory of Hawaii from the time he so assumed the command of the Hawaiian Department on February 8, 1941, until December 17, 1941, both dates inclusive; that on December 17, 1941, Delos C.

Emmons, Lieutenant General, United States Army, having heretofore been duly designated by the War Department of the United States as The Commanding General, Hawaiian Department, duly succeeded the said Walter C. Short, Lieutenant General, United States Army, as the Commanding General, Hawaiian Department; that the said Delos C. Emmons, Lieutenant General, United States Army, was the duly appointed, qualified, and acting Commanding General of the Hawaiian Department, and duly was in command of the military forces of the United States in the Territory of Hawaii, from the time that he so assumed command of the Hawaiian Department on December 17, 1941, until June 1, 1943, both dates inclusive; that Robert C. Richardson, Jr., Lieutenant General, United States Army, having heretofore been duly designated by the War Department of the United States [30] as The Commanding General, Hawaiian Department, duly assumed the command of the Hawaiian Department on June 1, 1943; that the said Robert C. Richardson, Jr., Lieutenant General, United States Army, now is, and ever since said June 1, 1943, has been the duly appointed, qualified, and acting Commanding General of the Hawaiian Department, and duly in command of the military forces of the United States in the Territory of Hawaii.

3.

That Joseph B. Poindexter duly was nominated as Governor of the Territory of Hawaii by the President of the United States on March 7, 1938; that the nomination of said Joseph B. Poindexter as Gov-

ernor of the Territory of Hawaii by the President of the United States as aforesaid, duly was confirmed and ratified by the United States Senate on March 9, 1938, and that said Joseph B. Poindexter thereafter duly qualified as such Governor of the Territory of Hawaii, that the said Joseph B. Poindexter was the duly nominated, qualified, and acting Governor of the Territory of Hawaii, from the time of his nomination as said Governor on March 7, 1938, until August 23, 1942, both dates inclusive; that Ingram M. Stainback duly was nominated as Governor of the Territory of Hawaii by the President of the United States on July 23, 1942; that the nomination of said Ingram M. Stainback as Governor of the Territory of Hawaii by the President of the United States as aforesaid duly was confirmed and ratified by the United States Senate on July 27, 1942; that the said Ingram M. Stainback duly took the oath of office as Governor of the Territory of Hawaii on August 24, 1942; that the said Ingram M. Stainback now is, and ever since August 24, 1942, has been the duly nominated, qualified and acting Governor of the Territory of Hawaii. [31]

4.

That Section 67 of the Organic Act of the Territory of Hawaii, being the Act of April 30, 1900, 31 Sts. at L. 141, c. 339, 48 U. S. C. Sec. 532 and being an act to provide a government for the Territory of Hawaii provides that the Governor of the Territory of Hawaii, shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii, within the said Territory, and that whenever it becomes necessary, he may call

upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, or that he may, in case of rebellion or invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory of Hawaii, or any part thereof, under martial law until communication can be had with the President of the United States, and his decision thereon made known.

5.

That on December 7, 1941, an attack and invasion was perpetrated upon the Territory of Hawaii by the military and naval forces of the Empire of Japan; that a state of war now exists between the United States and the Empire of Japan and Germany, and has so existed since on or about December 7, 1941; that the respondent is informed by the military and naval authorities of the United States and believes and therefore alleges that the Territory of Hawaii now is in imminent danger of invasion by the armed forces and other agents and agencies of the Empire of Japan, and has remained [32] constantly and continuously in such imminent danger of invasion by such armed forces and other agents and agencies of the Empire of Japan since the aforesaid attack and invasion was perpetrated upon the Territory of Hawaii by the military and naval forces of the Empire of Japan on December 7, 1941.

6.

That the respondent is informed by the military and naval authorities of the United States and believes and therefore alleges that the Territory of Hawaii now is, and at all times since the said attack and invasion thereof by the military and naval forces of the Empire of Japan on December 7, 1941, has been in the actual theater of the war between the United States and the Empire of Japan and Germany; that the Territory of Hawaii now is, and since the attack and invasion thereof, as aforesaid on December 7, 1941, has constantly and continuously been in the theater of operations of the war between the United States and the said Empire of Japan and Germany; that enormous quantities of materials and supplies for the conduct of the said war within the said Territory of Hawaii and in the area area immediately surrounding said Territory of Hawaii, and in the Central and South Pacific Ocean, now are, and since the aforesaid attack and invasion, constantly and continuously have been transported to, within, and from the Territory of Hawaii; that enormous quantities of military, naval, and civilian supplies and equipment and great numbers of military, naval, and civilian personnel for the conduct of said war are now, and since December 7, 1941, have been within the Territory of Hawaii; that the respondent is informed by the military and naval and military authorities of the United States and believes and therefore alleges that the armed forces of the Empire of Japan now are, and ever since the aforesaid attack [33] and invasion of the

Territory of Hawaii on December 7, 1941, have been constantly and continuously waging war against the United States within the Territory of Hawaii, and the vicinity thereof

7.

That on December 7, 1941, the Honorable Joseph B. Poindexter, as the Governor of the Territory of Hawaii, pursuant to a proclamation issued by him on said date as such Governor, a copy of which proclamation is attached hereto as respondent's Exhibit "A" and incorporated herein by reference thereto as though fully set forth herein, called upon the said Walter C. Short, Lieutenant General, United States Army, The Commanding General, Hawaiian Department to prevent said invasion by the armed forces of the Empire of Japan, and suspended the privilege of the writ of habeas corpus and placed the Territory of Hawaii under martial law until communication could be had with the President of the United States and his decision thereon made known; that the said Walter C. Short, Lieutenant General, United States Army, The Commanding General, Hawaiian Department, pursuant to a proclamation, a copy of which proclamation is attached hereto as Exhibit "B" and incorporated into this answer by reference thereto as though fully set forth herein, accepted the aforesaid call made upon him by the Honorable Joseph B. Poindexter, as Governor of the Territory of Hawaii; that the respondent is informed and believes and thereupon alleges that the public safety of the Territory of Hawaii required

that the Honorable Joseph B. Poindexter, as Governor of the Territory of Hawaii, suspend the privilege of the writ of habeas corpus and place the Territory of Hawaii under [34] martial law as aforesaid; that the Honorable Joseph B. Poindexter, Governor of the Territory of Hawaii, transmitted to the Honorable Franklin D. Roosevelt, the President of the United States, a communication, a copy of which is attached hereto as Exhibit "B1" and incorporated in this answer by reference thereto as though fully set forth herein, stating that the privilege of the writ of habeas corpus had been suspended and that the Territory of Hawaii had been placed under martial law as aforesaid; thereafter on December 9, 1941 the President made known his decision thereon by a reply to the Governor, a copy of which is attached hereto as Exhibit "B2" and incorporated herein by reference as though fully set forth herein, stating that the President approved the said action of the Honorable Joseph B. Poindexter, as the Governor of the Territory of Hawaii, in so suspending the privilege of the writ of habeas corpus and so placing the Territory of Hawaii under martial law, in accordance with the said Organic Act; that the President of the United States since so approving the said action of the said Honorable Joseph B. Poindexter in so suspending the privilege of the writ of habeas corpus in the Territory of Hawaii and so placing the Territory of Hawaii under martial law has never revoked the aforesaid proclamation nor said action of the said Joseph B. Poindexter so approved by the said President of the United

States, nor revoked, rescinded, or terminated his approval thereof, nor terminated the state of martial law in the Territory of Hawaii, nor restored the privilege of the writ of habeas corpus in said Territory of Hawaii. [35]

8.

That the said Walter C. Short, Lieutenant General, United States Army, having relinquished command of the Hawaiian Department on December 17, 1941, thereafter on said December 17, 1941, pursuant to the proclamation, a copy of which is attached hereto as Exhibit "C" and incorporated into this answer by reference thereto as though fully set forth herein, relinquished his position of Military Governor of the Territory of Hawaii; that Delos C. Emmons, Lieutenant General, United States Army, at the time that the said Walter C. Short, Lieutenant General, United States Army relinquished his command of the Hawaiian Department on December 17, 1941, as aforesaid, thereafter on said December 17, 1941, duly assumed the command of the Hawaiian Department and, thereafter on the same day after the said Walter C. Short, Lieutenant General, United States Army, had relinquished his position of Military Governor of the Territory of Hawaii as aforesaid, pursuant to his proclamation dated December 17, 1941, a copy of which proclamation is attached hereto as Exhibit "D" and incorporated into this answer by reference thereto as though fully set forth herein, assumed the position of Military Governor of the Territory

of Hawaii; that thereafter on June 1, 1943, the aforesaid Delos C. Emmons, Lieutenant General, United States Army, relinquished command of the Hawaiian Department and thereafter on said June 1, 1943, pursuant to his proclamation, a copy of which is attached hereto as Exhibit "E" and incorporated into this answer by reference thereto as though fully set forth herein, relinquished his position as Military Governor of the Territory of Hawaii; that Robert C. Richardson, Jr., Lieutenant General, United States [36] Army, on June 1, 1943, at the time that the said Delos C. Emmons, Lieutenant General, United States Army, relinquished command of the Hawaiian Department as aforesaid, duly assumed the command of the said Hawaiian Department and thereafter on said June 1, 1943, after the said Delos C. Emmons, Lieutenant General, United States Army, had relinquished his position as Military Governor of the Territory of Hawaii as aforesaid, pursuant to his proclamation dated June 1, 1943, a copy of which is attached to this answer as Exhibit "F" and incorporated into this answer by reference thereto as though fully set forth herein, assumed the position of the Military Governor of the Territory of Hawaii and duly adopted and ratified the then existing orders issued by the said Delos C. Emmons, Lieutenant General, United States Army, as Military Governor as aforesaid; that Robert C. Richardson, Jr., Lieutenant General, United States Army, now is, and has been, the duly qualified and acting Military Governor of the Territory of Hawaii, since assuming said po-

Interior sent to the President of the United States that certain letter, a copy of which is attached to this answer as Exhibit "H", and incorporated into this answer by reference thereto as though fully set forth herein; that said letter signed by the Secretary of War, the Attorney General of the United States, and the Secretary of the Interior, and approved by Warner W. Gardner, Solicitor of the Interior, Ingram M. Stainback, Governor of the Territory of Hawaii, Abe Fortas, Undersecretary of the Department of the Interior, Delos C. Emmons, Lieutenant General, the Commanding General, Hawaiian Department, and John J. McCloy, Assistant Secretary of War; that the respondent is informed and believes and thereupon alleges that on February 1, 1943, the President of the United States, in reply to the aforesaid letter to him, wrote the Secretary of War the letter, a copy of which is attached to this answer as Exhibit "I", and incorporated into this answer by reference thereto as though fully set forth herein. [39]

10.

That on said February 8, 1943, immediately after the Honorable Ingram M. Stainback had issued his proclamation to the people of Hawaii as aforesaid, that Delos C. Emmons, Lieutenant General, United States Army, as The Commanding General, Hawaiian Department, and as the Military Governor of the Territory of Hawaii, duly issued the proclamation, a copy of which is attached hereto as Exhibit "J" and incorporated into this answer by reference thereto as though fully set forth herein.

11.

That the respondent is informed and believes and thereupon alleges that on February 8, 1943, at the time that the aforesaid proclamations were issued on February 8, 1943, as aforesaid, the said Honorable Ingram M. Stainback, Governor of the Territory of Hawaii, publicly made to the people and the press of the Territory of Hawaii the statements hereto attached as Exhibit "K" and incorporated into this answer by reference thereto as though fully set forth herein.

12.

That thereafter on March 10, 1943, the said Delos C. Emmons, Lieutenant General, United States Army, as The Commanding General, Hawaiian Department, and as the Military Governor of the Territory of Hawaii, duly reappointed Thomas H. Green, Brigadier General, United States Army, as Executive to the Military Governor, pursuant to Paragraph 1.01, General Orders No. 1, Office of the [40] Military Governor, 10 March 1943, and that the said Thomas H. Green, Brigadier General, United States Army, was the duly appointed, qualified, and acting Executive to the Military Governor of the Territory of Hawaii from the time that he was reappointed as such Executive on March 10, 1943, to April 6, 1943, both dates inclusive; that the respondent is informed and believes and thereupon alleges that the aforesaid Thomas H. Green, Brigadier General, United States Army, as such Executive to the Military Governor of the Territory of

Hawaii, duly was authorized and empowered by the Military Governor of the Territory of Hawaii to issue General Orders for and on behalf of and by order of the Military Governor of the Territory of Hawaii; that thereafter on April 6, 1943, the said Delos C. Emmons, Lieutenant General, United States Army, The Commanding General, Hawaiian Department, and the Military Governor of the Territory of Hawaii, duly appointed William R. C. Morrison, Colonel, J.A.G.D., as Executive to the Military Governor, which respondent is informed and believes and thereupon alleges was pursuant to Paragraph 1.01, Title 1, General Orders No. 1, Office of the Military Governor, 10 March 1943, as amended by Paragraph 1.01, Title 1, General Orders No. 17, Office of the Military Governor, 6 April 1943, vice Thomas H. Green, Brigadier General, United States Army, relieved as said Executive on said 6 April 1943 by said Paragraph 1.01, Title 1, of said General Orders No. 17, and that the said William R. C. Morrison, Colonel, J.A.G.D., now is and at all times since his appointment as Executive as aforesaid on 6 April 1943, has been the duly appointed, qualified, and acting Executive to the Military Governor of the Territory of Hawaii; that the respondent is informed and believes and thereupon alleges that the aforesaid William R. C. Morrison, [41] Colonel, J.A.G.D., as such Executive to the Military Governor of the Territory of Hawaii, duly was authorized and empowered by the Military Governor of the Territory of Hawaii to issue Gen-

eral Orders for and on behalf of and by order of the Military Governor of the Territory of Hawaii.

13.

That on March 10, 1943, the said Delos C. Emmons, Lieutenant General, United States Army, as The Commanding General, Hawaiian Department, and as the Military Governor of the Territory of Hawaii, supplementing the aforesaid proclamations of the Governor and of the Commanding General and Military Governor of February 8, 1943, proclaimed that a state of martial law remains in effect within the Territory of Hawaii and that the privilege of the writ of habeas corpus has been and remains suspended; by issuing and publishing Paragraph 1.01, General Orders No. 2, Office of the Military Governor, 10 March 1943, which proclamation and paragraph was as follows:

> "1.01. A state of martial law remains in effect and the privilege of the writ of habeas corpus has been, and remains, suspended."

14.

That the respondent is informed by the military and naval authorities of the United States as appears from the affidavit of C. W. Nimitz, Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas, sworn to on March 22, 1944, and from the affidavit of Robert C. Richardson, Jr., Lieutenant General, United States Army, Commanding General, United States Army Forces, Central Pacific Area, sworn to on March 24, 1944, attached [42] to this answer as Exhibits

"L" and "M" respectively, and incorporated herein by reference as if set forth herein, and believes and therefore alleges that, as alleged in paragraph II 5 above, the Territory of Hawaii now is in imminent danger of invasion by the armed forces, and other agents and agencies of the Empire of Japan, and has been in such imminent danger of invasion by said armed forces and other agents and agencies at all times since the invasion of said Territory of Hawaii by the armed forces of Japan on December 7, 1941; that the public safety of the Territory of Hawaii now requires, and has at all times since the attack and invasion of the Territory of Hawaii by the said armed forces of the Empire of Japan on December 7, 1941, required, that the privilege of the writ of habeas corpus be suspended within the Territory of Hawaii, and that the Territory of Hawaii be placed and remain under martial law; that the privilege of the writ of habeas corpus now duly is suspended within the Territory of Hawaii, and duly has been suspended at all times since being suspended as alleged above, on December 7, 1941; that the Territory of Hawaii now duly is placed under martial law and has duly remained under martial law at all times since the said Territory of Hawaii was placed under martial law by the Honorable Joseph B. Poindexter, Governor of the Territory of Hawaii, on December 7, 1941.

15.

That respondent is informed by the military and naval authorities of the United States and believes

and therefore alleges that at the present time the total civilian population of the Territory of Hawaii is approximately [43] 458,000 and that of the aforesaid 458,000 people there are living, residing, and situated within the Territory of Hawaii approximately 35,183 Japanese who are enemy aliens, being citizens of Japan, and approximately 124,351 American citizens of Japanese ancestry of whom 67,675 are dual citizens of the United States and of the Empire of Japan, being born in the United States and Nationals of the Empire of Japan; that certain of the said Japanese enemy aliens, citizens of the United States of Japanese ancestry and dual citizens of the United States and Empire of Japan, are known by the Intelligence agencies of the United States within the Territory of Hawaii to be loyal to the Empire of Japan and disloyal to the United States; that a number of citizens of the United States of Japanese ancestry are now, and on March 2, 1944, were interned within the Territory of Hawaii by Lieutenant General Robert C. Richardson, Jr., The Commanding General, United States Army Forces, Central Pacific Area, for the reason that said persons are deemed by the said Commanding General to be dangerous to the public peace, safety, and security of the United States; and that the internment within the Territory of Hawaii of certain of said citizens of the United States is necessary for the prosecution of the war in the theater of war of which the Territory of Hawaii is a part.

16.

That the respondent is informed and believes and thereupon alleges that between December 7, 1941, and January 30, 1943, both dates inclusive, The Commanding General, Hawaiian Department, [44] in his capacity as Military Governor of the Territory of Hawaii, and as the Military Commander of the military forces of the United States in this actual theater of war of which the Territory of Hawaii constitutes a part, issued for the government of all persons within the Territory of Hawaii General Orders Nos. 1 to 181, inclusive, Office of the Military Governor, which were published and are publicly and judicially known; that the issuance of the aforesaid General Orders and each thereof was necessary and proper in the prosecution of the war in said theater of war and within that part of the said theater of war constituted of the Territory of Hawaii; that the Territory of Hawaii now is and at all times in this answer mentioned and stated was within the theater of war of the war between the United States and the Empire of Japan and a part of the aforesaid theater of war within the command of the aforesaid Commanding General.

17.

That the respondent is informed and believes and thereupon alleges that between March 10, 1943, and March 2, 1944, both dates inclusive, the Commanding General, Hawaiian Department, now officially designated by the War Department, Washington, D. C., and known, and so designated and known

since August 14, 1943, as The Commanding General, United States Army Forces, Central Pacific Area, within whose command is located and situated the Territory of Hawaii, as the Military Commander of the military forces of the United States in the actual theater of war constituted in part of the Territory of Hawaii, issued for the government of all persons within the Territory of Hawaii, General Orders Nos. 1 to 14, inclusive, Office of the Military Governor, [45] March 10, 1943, and amendments and rescissions thereof, copies of which are attached to this answer as Exhibit "N", and incorporated into this answer by reference thereto as though fully set forth herein; that the issuance of the said General Orders, Nos. 1 to 14, inclusive, and the said amendments and rescissions thereof, and each thereof was necessary and proper for the successful prosecution of the war in said theater of war and within that part of said theater of war constituted of the Territory of Hawaii.

18.

That the respondent is informed and believes and thereupon alleges that the appointment of the Provost Courts by the various General Orders of the Military Governor providing for the appointment of Provost Courts contained in Exhibit "N" hereto attached, and investing the Provost Courts with the power and authority set forth in the aforesaid General Orders, is and was necessary and proper for the trial and punishment of those persons who violated the aforesaid General Orders of the Mili-

tary Governor of the Territory of Hawaii and necessary for the maintenance of law, order, and security, and protection of military and naval installations, equipment, and supplies, required for the successful prosecution of the war against the Empire of Japan by the United States; that the acts of The Commanding General, Hawaiian Department, and his successor in office, The Commanding General, United States Army Forces, Central Pacific Area, in so appointing such Provost Courts and investing them with the powers and authority granted to said Provost Courts by said General Orders and by Special Orders of the Military Governor, was necessary and proper for the successful prosecution of the war within this theater of war of which the Territory of Hawaii constitutes a part. [46]

19.

That the respondent is informed and believes and thereupon alleges that the said Commanding Generals have invested each said Provost Court appointed as aforesaid with full power and authority to provide for the confinement in Oahu Prison, or in any city and county jail, or in any county jail, within the Territory of Hawaii, of any person sentenced by such Provost Court to confinement, with or without hard labor, and have authorized, empowered, and directed each such Provost Court in the name or on behalf of the Military Governor of the Territory of Hawaii, to order the Warden of Oahu Prison, or any jailer or other person having custody or control of any jail or other place of im-

prisonment within the Territory of Hawaii to accept and receive from such Provost Court any person sentenced to confinement in the place of imprisonment designated by such Provost Court, and to retain such person in his custody and such place of imprisonment until the sentence of confinement imposed upon such person by said Provost Court has been satisfied; that the said Commanding Generals have directly and expressly ordered the said Warden of Oahu Prison, the various jailors mentioned, and the other persons having control and custody of other places of imprisonment within the Territory of Hawaii, to comply with any such sentence or order of such a Provost Court and to accept and retain in the place of confinement within the control of such Warden, jailor, or other person aforesaid, the custody of any person so [47] ordered confined or committed by such Provost Court to the custody of such Warden, such jailor, or such other person, for the purpose of satisfying such a sentence; that the aforesaid orders of the said Commanding Generals to the Warden of Oahu Prison, the jailors mentioned, and the other persons having control and custody of places of confinement or imprisonment in the Territory of Hawaii, were necessary and proper for the successful prosecution of the war in this theater of war of which the Territory of Hawaii constitutes a part.

20.

That the respondent is informed and believes and thereupon alleges that Arthur L. Mundo, Lieuten-

ant Commander, United States Navy, (Ret.) duly was appointed a Provost Court at the United States Navy Yard, Pearl Harbor, Island of Oahu, Territory of Hawaii, on October 27, 1943, pursuant to Paragraph 5.01, Title 5, General Orders No. 2, Office of the Military Governor, 10 March 1943, as amended by Paragraph 1.01, Title 1, General Orders No. 39, Office of the Military Governor, 27 October 1943, copies of which are set forth in Exhibit "N" hereto attached; that the said Arthur L. Mundo, Lieutenant Commander, United States Navy, (Ret.), now is, and at all times since being so appointed as such a Provost Court, has been a duly appointed, qualified, and acting Provost Court at the United States Navy Yard, Pearl Harbor, Oahu, Territory of Hawaii. [48]

21.

That Paragraph 8.01, Title 8, General Orders No. 2, Office of the Military Governor, 10 March 1943, a copy of which said Paragraph 8.01 is included in Exhibit "N" hereto attached, provides that

> "8.01. No person shall commit an assault or an assault and battery on any military police, any member of the shore patrol, or other military or naval personnel, with intent to resist, prevent, hinder, or obstruct him in the discharge, execution, or performance of his duty as such, nor shall any person wilfully interfere or attempt to interfere with any military police, any member of the shore patrol, or other military or

naval personnel in the performance of his official, defined, or required duties as such."

22.

That the United States Navy Yard, Pearl Harbor, Island of Oahu, Territory of Hawaii, is a major naval base in the Central Pacific Area of the Pacific Ocean of the United States and of the nations allied with it in the prosecution of the war against the Empire of Japan; that many warships of the United States from time to time are docked, maintained, or repaired at the said Navy Yard; that it is a requirement that no person enter the said Navy Yard unless authorized to so enter by The Commandant of said [49] Navy Yard and that the identity and authority of each person entering or attempting to enter the Navy Yard be fully established at the gates to the Navy Yard before such person is allowed to enter the yard, and that those authorized to enter or leave the Navy Yard be permitted to do so as expeditiously as possible; that at the present time and for many months immediately last past, a daily average of over 11,000 motor vehicles, a daily average of over 63,000 pedestrians and motor vehicle passengers, composed of civilians and members of the armed forces, and three trains containing a daily average of over 15,000 passengers, have entered the said Navy Yard every twenty-four hours; that the main flow of pedestrian and vehicular traffic enters the said Navy Yard through three gates only; that approximately two-thirds of the civilians entering Pearl Harbor enter during

the day shift which begins at 7:00 A.M.-7:30 A.M.; that approximately one-third of the civilians enter during the other two shifts commencing at 3:00 P.M.-3:30 P.M. and 11:00 P.M.-11:30 P.M.; that great quantities of munitions and supplies used in the defense of the Territory of Hawaii and in the prosecution of the war in this theater of war are stored within the boundaries of said Navy Yard; that vital and highly confidential equipment is continuously within said Navy Yard.

23.

That the respondent is informed and believes and thereupon alleges that thereafter on February 29, 1944, charges, of which a copy is attached hereto as Exhibit "C" and incor- [50] porated into this answer by reference thereto as though fully set forth herein, duly signed and sworn to, and charging the petitioner with a violation of Paragraph 8.01, Title 8, General Orders No. 2, Office of the Military Governor, 10 March 1943, duly were filed with the said Arthur L. Mundo, Lieutenant Commander, U. S. Navy (Ret.), as the Provost Court at the United States Navy Yard, Pearl Harbor, T. H.; that thereupon a Penal Summons, a copy of which is attached hereto as Exhibit "P" and incorporated into this answer by reference thereto as though fully set forth herein, was served upon the petitioner requiring him to appear before the said Provost Court on March 1, 1944, to answer the said charge; that thereafter the said Lloyd C. Duncan duly came before said Court for hearing and trial

upon said charges; that the said Lloyd C. Duncan was fully informed of his right to be represented by counsel at said trial, but waived representation by counsel, and thereupon was duly tried and convicted and a copy of the transcript of the record of the trial is attached hereto as Exhibit "Q" incorporated into this answer by reference thereto as though fully set forth herein; that thereafter said Lloyd C. Duncan was sentenced upon said charge by said Provost Court to be imprisoned in the jail of the City and County of Honolulu, Territory of Hawaii, of which your respondent is in official control; that a copy of the mittimus or commitment issued by said Provost Court pursuant to which the said Lloyd C. Duncan was placed in the custody of your respondent is attached hereto as Exhibit "R" and incorporated int this answer by reference thereto as though fully set forth herein; that your respondent now holds the petitioner in his custody pursuant to the various afore-mentioned orders of Robert C. Richardson, Jr., [51] Lieutenant General, The Commanding General, United States Army Forces, Central Pacific Area, issued by said Commanding General as Military Governor of the Territory of Hawaii and as the Military Commander of the Military Forces of the United States in this theater of war.

24.

That the United States District Court for the Territory of Hawaii is without jurisdiction to order your respondent, Duke Paoa Kahanamoku, to produce the body of the petitioner before your honor

in response to a writ of habeas corpus or to issue any order herein releasing or otherwise discharging the petitioner from the custody of your respondent, for the reasons that a state of martial law now exists, and at all times herein mentioned and stated has existed, within the Territory of Hawaii and the privilege of the writ of habeas corpus now remains suspended, and at all times herein mentioned and stated, has been suspended; and for the further reasons that military necessary requires the existence and operation of the said provost courts and in particular requires the trial and punishment by such courts of persons assaulting military police, military sentries and other military personnel in the performance of their duties; and finally for the reasons that the said provost courts were established for such purposes by the said Commanding General and Military Governor in good faith and in the honest belief that in their military judgment military necessity requires such action and for the reason that such military action is not unreasonable or arbitrary. [52]

Wherefore, your respondent respectfully submits that the petition herein should be denied and dismissed.

Dated at Honolulu, T. H., this 29th day of March, 1944.

/s/ DUKE PAOA KAHANAMOKU
Sheriff, City and County of Honolulu, Territory of Hawaii, Respondent

/s/ G. D. CROZIER
United States Attorney, District of Hawaii

/s/ EDWARD J. ENNIS
Special Assistant to the Attorney General

/s/ EDWARD TOWSE
Assistant United States Attorney, District of Hawaii
Attorneys for Respondent

/s/ WILLIAM J. HUGHES, JR.
Lieut. Colonel, J.A.G.D.

/s/ EUGENE V. SLATTERY
Lieut. Colonel, J.A.G.D.
Of Counsel [53]

Territory of Hawaii
City and County of Honolulu—ss.

Duke Paoa Kahanamoku, being duly sworn on oath deposes and says:

That he is the Sheriff for the City and County of Honolulu and as such, the jailer of, the City and County Jail, City and County of Honolulu, Territory of Hawaii, and in that capacity made and signed the foregoing return and answer to Petition and return to Order to Show Cause; that he has

read the same, knows the contents thereof, and that all allegations of fact therein are true excepting such as are made upon information and belief and as to those, he believes them to be true to the best of his information, knowledge and belief, and the source of his information and knowledge is the military and naval authorities of the United States.

/s/ DUKE PAOA KAHANAMOKU
Sheriff, City and County of Honolulu, Territory of Hawaii, Respondent

Subscribed and sworn to before me this 29th day of March, 1944.

[Seal] /s/ WM. F. THOMPSON, JR.
Clerk United States District Court for the District of Hawaii [54]

EXHIBIT A

Territory of Hawaii
A Proclamation

Whereas, it is provided by Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, that, whenever it becomes necessary, the Governor of that territory may call upon the commander of the military forces of the United States in that territory to prevent invasion; and

Whereas, it is further provided by the said section that the governor may in case of invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of

habeas corpus and place the territory under martial law; and

Whereas, the armed forces of the Empire of Japan have this day attacked and invaded the shores of the Hawaiian Islands; and

Whereas, it has become necessary to repel such attack and invasion; and

Whereas, the public safety requires;

Now, Therefore, I, J. B. Poindexter, Governor of the Territory of Hawaii, do hereby announce that, pursuant to said section, I have called upon the Commanding General, Hawaiian Department, to prevent such invasion;

And, pursuant to the same section, I do hereby suspend the privilege of the writ of habeas corpus until further notice;

And, pursuant to the same section, I do hereby place the said territory under martial law;

And, I do hereby authorize and request the Commanding General, Hawaiian Department, during the present [55] emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor;

And I do further authorize and request the said Commanding General, Hawaiian Department, and those subordinate military personnel to whom he may delegate such authority, during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this territory and of the counties and cities therein, and such other and further powers as the emergency may require;

And I do require all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and in spirit, such proclamations, rules, regulations and orders, as the Commanding General, Hawaiian Department, or his subordinates, may issue during the present emergency.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Territory of Hawaii to be affixed.

Done at Honolulu, Territory of Hawaii, this 7th day of December, 1941.

[Seal] (s) J. B. POINDEXTER
Governor of the Territory of Hawaii.

By the Governor:
CHAS M. HITE
Secretary of Hawaii.

3:30 P.M.

A true and correct copy:
/s/ JAMES F. HANLEY
Major, J.A.G.D.

EXHIBIT B

Proclamation
United States Army
Headquarters Hawaiian Department
Fort Shafter, 7 December 1941

To the People of Hawaii:

The military and naval forces of the Empire of Japan have attacked and attempted to invade these islands.

Pursuant to section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, the Governor of Hawaii has called upon me, as commander of the military forces of the United States in Hawaii, to prevent such invasion; has suspended the privilege of the writ of habeas corpus; has placed the Territory under martial law; has authorized and requested me and my subordinates to exercise the powers normally exercised by the governor and by subordinate civil officers; and has required all persons within the Territory to obey such proclamations, orders, and regulations as I may issue during the present emergency.

I announce to the people of Hawaii, that, in compliance with the above requests of the Governor of Hawaii, I have this day assumed the position of military governor of Hawaii, and have taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense.

All persons within the Territory of Hawaii, whether residents thereof or not whether citizens of the United States or not, of no matter what race or nationality, are warned that by reason of their presence here they owe during their stay at least a temporary duty of obedience to the United States, and that they are bound to refrain from giving, by word or deed, and aid or comfort to the enemies of the United States. Any violation of this duty is treason, and will be punished by the severest penalties.

The troops under my command, in putting down any disorder or rebellion and in preventing any aid to the invader, will act with such firmness and vigor and will use such arms as the accomplishment of their task may require.

The imminence of attack by the enemy and the possibility of invasion make necessary a stricter control of your actions than would be necessary or proper at other times. I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects.

In order to assist in repelling the threatened invasion of our island home, good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders [56] will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function.

Pending further instructions from this headquarters the Hawaii Defense Act and the Proclamations of the Governor of Hawaii heretofore issued thereunder shall continue in full force and effect.

(signed) WALTER C. SHORT,
Lieutenant General, U. S. Army, Commanding.
Military Governor of Hawaii.

A True Copy:

JAMES F. HANLEY,
Major, J.A.G.D.

EXHIBIT B-1

S. C. Form No. 11

Signal Corps, United States Army

Received at War Department Message Center,
Room 3441, Munitions Building,
Washington, D. C.

P49WTJ PX 42WD Priority

FtShafter 516P Dec 7 1941

The President the White House
Washington D C

I Have Today Declared Martial Law Throughout the Territory of Hawaii and Have Suspended the Privilege of the Writ of Habeas Corpus Period Your Attention Is Called to Section Sixty Seven of the Hawaiian Organic Act for Your Decision on My Action

POINDEXTER
1106PM Dec 7th 1941 [57]

EXHIBIT B-2

Standard Form No. 14A
Approved By the President
March 10, 1926

From The White House
Washington
December 9, 1941

Telegram
Official Business—Government Rates
48 U S Govt Cable

Honorable Joseph B. Poindexter,
Governor, Territory of Hawaii,
Honolulu, Hawaii.

Your Telegram of December Seventh Received

and Your Action in Suspending the Writ of Habeas Corpus and Placing the Territory of Hawaii Under Martial Law in Accordance with U.S.C., Title 48, Section 532 Has My Approval.

FRANKLIN D. ROOSEVELT

[58]

EXHIBIT C

Proclamation
United States Army

To the people of the Territory of Hawaii:

Whereas, the Governor of the Territory of Hawaii, J. B. Poindexter, by a proclamation dated December 7, 1941, and made pursuant to the authority of Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, called upon me, as commander of the military forces of the United States in this Territory, to prevent invasion; suspended the writ of habeas corpus; placed the Territory under martial law; authorized and requested me and my subordinates to exercise the powers normally exercised by the Governor and by subordinate civil officers; and required all persons within the said Territory to obey such proclamations, orders, and regulations as I, or my subordinates, might issue during the present emergency;

Whereas, I by proclamation dated December 7, 1941, announced to the people of the Territory of Hawaii that, in compliance with the above recited requests of the Governor of the Territory of Hawaii, I had that day assumed the position of Military Governor of the Territory of Hawaii and had taken

charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense;

And Whereas, I have this day relinquished command of the Hawaiian Department in accordance with War Department radiogram dated 17 December 1941; [59]

Now, Therefore, I, Walter C. Short, do hereby relinquish my position as Military Governor of the Territory of Hawaii.

Done at Headquarters Hawaiian Department, Fort Shafter, Territory of Hawaii, this 17th day of December, 1941.

(signed) WALTER C. SHORT,
Lieutenant General, U. S.
Army, Commanding,
Military Governor of Hawaii.

A True Copy:
JAMES F. HANLEY (signed)
Major, J.A.G.D.

EXHIBIT D

Proclamation
United States Army

To the people of the Territory of Hawaii:

Whereas, the Governor of the Territory of Hawaii, J. B. Poindexter, by a proclamation dated December 7, 1941, and made pursuant to the authority of Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, called

upon the Commanding General, Hawaiian Department, as commander of the military forces of the United States in this Territory, to prevent invasion; suspended the writ of habeas corpus; placed the Territory under martial law; authorized and requested the Commanding General, Hawaiian Department, and his subordinates, to exercise the powers normally exercised by the Governor and by subordinate civil officers; and required all persons within the said Territory to obey such proclamations, orders, and regulations as the Commanding General, Hawaiian Department, or his subordinates, mich issue during the present emergency;

Whereas, Lieutenant General Walter C. Short, U. S. Army, Commanding the Hawaiian Department, by proclamation dated December 7, 1941, announced to the people of the Territory of Hawaii that, in compliance with the above recited requests of the Governor of the Territory of Hawaii, he had that day assumed the position of Military Governor of the Territory of Hawaii and had taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense; [60]

Whereas, Lieutenant General Walter C. Short, U. S. Army, Commanding the Hawaiian Department, has this day relinquished command of the Hawaiian Department in accordance with War Department readiogram dated December 17, 1941;

Whereas, Lieutenant General Walter C. Short, U. S. Army, Commanding the Hawaiian Depart-

ment, has this day relinquished his position as Military Governor of the Territory of Hawaii;

And Whereas, I have this date assumed command of the Hawaiian Department in accordance with War Department radiogram dated December 17, 1941;

Now, Therefore, I, Delos C. Emmons, announce to the people of the Territory of Hawaii that I have this day assumed the position of the Military Governor of the Territory of Hawaii, and as such Military Governor I adopt and confirm the instructions contained in the fifth to ninth paragraphs, inclusive, of the proclamation of the Military Governor of the Territory of Hawaii dated December 7, 1941, and the general orders and other actions taken pursuant thereto.

Done at Headquarters Hawaiian Department, Fort Shafter, Territory of Hawaii, this 17th day of December, 1941.

(signed) DELOS C. EMMONS,
Lieutenant General, U. S.
Army, Commanding,
Military Governor of Hawaii.

A True Copy:
/s/ JAMES F. HANLEY
Major, J.A.G.D.

EXHIBIT E

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

1 June 1943

PROCLAMATION

To the People of the Territory of Hawaii:

Whereas the Governor of the Territory of Hawaii by his proclamation of December 7, 1941, placed the Territory of Hawaii under martial law in the exercise of his powers under Section 67 of the Organic Act of the Territory of Hawaii and called upon Walter C. Short, Lieutenant General, United States Army, The Commanding General, Hawaiian Department, as commander of the military forces of the United States in said Territory of Hawaii, to prevent invasion thereof; and whereas on said date the said Walter C. Short, Lieutenant General, United States Army, The Commanding General, Hawaiian Department, assumed the position of Military Governor of the Territory of Hawaii; and,

Whereas the said Walter C. Short, Lieutenant General, United States Army, on December 17, 1941, relinquished command of the Hawaiian Department and his position as Military Governor of the Territory of Hawaii; and,

Whereas I, Delos C. Emmons, Lieutenant General, United States Army, thereafter on said December 17, 1941, assumed command of the Hawaiian Department in accordance with War Department

orders and thereafter on said date assumed the position of Military Governor of the Territory of Hawaii; and,

Whereas I have this day relinquished command of the Hawaiian Department in accordance with War Department orders;

Now, Therefore, I, Delos C. Emmons, Lieutenant General, United States Army, hereby do relinquish my position as Military Governor of the Territory of Hawaii.

/s/ DELOS C. EMMONS
Lieutenant General, United States Army
Military Governor of the Territory of Hawaii

A True Copy:

WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive [61]

EXHIBIT F

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

1 June 1943

PROCLAMATION

To the People of the Territory of Hawaii:

Whereas the Governor of the Territory of Hawaii by his proclamation of December 7, 1941, placed the Territory of Hawaii under martial law

the exercise of his powers under Section 67 of the Organic Act of the Territory of Hawaii and called upon Walter C. Short, Lieutenant General, United States Army, The Commanding General, Hawaiian Department, as commander of the military forces of the United States in said Territory of Hawaii, to prevent invasion thereof; and whereas on said date the said Walter C. Short, Lieutenant General, United States Army, The Commanding General, Hawaiian Department, assumed the position of Military Governor of the Territory of Hawaii; and,

Whereas the said Walter C. Short, Lieutenant General, United States Army, on December 17, 1941, relinquished command of the Hawaiian Department and his position as Military Governor of the Territory of Hawaii; and,

Whereas, Delos C. Emmons, Lieutenant General, United States Army, thereafter on said December 17, 1941, assumed command of the Hawaiian Department in accordance with War Department orders and thereafter on said date assumed the position of Military Governor of the Territory of Hawaii; and,

Whereas the said Delos C. Emmons, Lieutenant General, United States Army, on this June 1, 1943, has relinquished command of the Hawaiian Department in accordance with War Department orders and has relinquished his position as Military Governor of the Territory of Hawaii; and,

Whereas, I, Robert C. Richardson, jr., Lieutenant General, United States Army, have on this date as-

sumed command of the Hawaiian Department in accordance with War Department orders; and,

Whereas a state of martial law remains in effect within the Territory of Hawaii and the privilege of the writ of habeas corpus remains suspended therein; [62]

Now, Therefore, I, Robert C. Richardson, jr., Lieutenant General, United States Army, and The Commanding General, Hawaiian Department, by virtue of the premises aforesaid, on this day hereby assume the position of Military Governor of the Territory of Hawaii, and, as such Military Governor of the Territory of Hawaii, I hereby assume all the powers and duties held, possessed, assumed, imposed upon, and exercised by the said Delos C. Emmons, Lieutenant General, United States Army, as Military Governor of the Territory of Hawaii, at the time that he, as aforesaid, relinquished the command of the Hawaiian Department and the said position of Military Governor of the Territory of Hawaii; and I, as Military Governor of the Territory of Hawaii, hereby adopt and ratify the existing orders issued by the said Delos C. Emmons, Lieutenant General, United States Army, as Military Governor as aforesaid.

/s/ ROBERT C. RICHARDSON, JR.
Lieutenant General, United States Army, Commanding General, Hawaiian Department, Military Governor of the Territory of Hawaii.

A True Copy:

WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

EXHIBIT G

By the Governor of Hawaii

A PROCLAMATION

Whereas, the Governor of Hawaii by his proclamation of December 7, 1941, placed the Territory of Hawaii under martial law, in exercise of his powers under section 67 of the Organic Act, which action was confirmed by the President of the United States on December 8, 1941; and

Whereas, a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended;

Now, Therefore, I, Ingram M. Stainback, Governor of Hawaii, under the authority given by section 67 of the Organic Act, do hereby proclaim:

1. The Governor of Hawaii and the other civilian officers and agencies of the federal, the territorial and the local governments, will resume on the thirtieth day hereafter their respective jurisdictions, functions and powers, according to law, with respect to the following matters, and others necessarily related thereto:

(a) Control of prices

(b) Rationing of commodities among the civilian population

(c) Control of hospitals, medical personnel, and medical supplies

(d) Food production by and distribution of food among the civilian population

(e) Control of rents

(f) Control of transportation and traffic by land, except the movement of troops, military supplies and equipment, and except that the Commanding General may prescribe rules for the traffic during blackout hours

(g) Public health, sanitation, and prevention of disease among civilians

(h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations

(i) Judicial proceedings, both criminal and civil, except: [63]

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect of any act or omission certified by the Commanding General to be in the line of of duty.

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the Territory or in the United States District Court for Hawaii, as the case may be.

(j) Control of imports for civilian consumption and exports by civilians within allotments of tonnage made by the Commanding General

(k) Censorship of mail from civilians in the Territory

(l) Control of liquor and narcotics

(m) Schools and children

(n) The custody of alien property

(o) Collection and disposition of garbage, ashes, and other waste

(p) Banking, currency, and securities, provided that the Commanding General may prescribe the measures to be taken to prevent the enemy from obtaining securities or money or realizing upon them if he should obtain them

(q) Civilian defense activities, except that the Commanding General shall have jurisdiction to prescribe the duties of the Civilian Defense Corps, and to regulate and inspect their training

(r) Control of the supply, employment, hours, wages, and working conditions of labor, except as to (1) employees of the United States under the War Department or the Navy Department, (2) workers employed on construction and other projects under the War Department or the Navy Department, (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities. It is contemplated that the Commanding General and the Governor of Hawaii by mutual agreement will appoint a joint advisory committee which shall from time to time

consult and advise with each of them with reference to labor matters in their respective fields. [64]

2. For the purposes of the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations, the Commanding General shall continue so far as he deems the military security of the Territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are resumed by civil authorities pursuant to paragraph 1 of this proclamation.

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it necessary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a military emergency, to exercise such of the functions and jurisdictions as are hereby or may hereafter be resumed by the civil authorities, or to issue such additional military orders, after consultation with the Governor of the Territory where civilian rights and the administration of the civilian government are affected, directing such action as in the judgment of the Commanding General may be required for the military security of the Territory.

4. Nothing in this proclamation shall operate to invalidate any conviction, or any application of military orders to persons or activities, or any other action, which occurred or shall occur prior to the thirtieth day hereafter.

5. I call upon all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and spirit, such orders as the Commanding General may issue under this proclamation and during the continuance of the state of martial law.

Done, at Honolulu, Territory of Hawaii, this 8 day of Feb., 1943.

INGRAM M. STAINBACK,
Governor of Hawaii. [65]

EXHIBIT H

(Copy)

18 January 1943

Dear Mr. President:

We are pleased to report that after lengthy discussions the Departments of War, Justice, and Interior have reached an operating agreement upon the distribution of governmental functions between the civil and military authorities in the Territory of Hawaii. Pursuant to this agreement the Governor of Hawaii and the Commanding General will issue simultaneous proclamations. Their effect is to leave unchanged the state of martial law and the suspension of the writ of habeas corpus, to restore to the civil government the majority of civil functions hitherto exercised by the Military authorities, and to provide emergency powers for the Military government. Copies of the proclamations are enclosed for your information. We also enclosed a draft of a letter which we suggest you might appro-

priately send to the Secretary of War. It is designed, as you will observe, to reassure the civilian departments that there will be no unnecessary resumption of the restored functions by the Military authorities.

Sincerely yours,

SECRETARY OF WAR
ATTORNEY GENERAL
SECRETARY OF THE INTERIOR

Approved:

Warner W. Gardner
Ingram M. Stainback
Abe Fortas
D. C. Emmons
John J. McCloy
The President, White house [66]

EXHIBIT I

(Copy)

The White House
Washington

February 1, 1943

My dear Mr. Secretary:

I have examined the proposed proclamation to be issued by the Commanding General, Hawaiian Department, and the proposed proclamation to be issued concurrently by the Governor of Hawaii. I understand that the Departments of War, Justice, and Interior have agreed in this manner to resolve the difficult questions surrounding the administration of government in the Territory of Hawaii.

I wish to congratulate all the Departments concerned in their cooperative and successful efforts to reach an amicable solution of the knotty problems involved. In an area of such strategic importance as the Hawaiian Islands in a time of active war in the Pacific, I can readily appreciate the difficulty in defining exactly the boundaries between civil and military functions. I think the formula which this proclamation applies meets the present needs.

I know that General Emmons will do all that he can, consistent with his military responsibility, to refrain from exercising his authority over what are normally civil functions. I am confident that the military and civil authorities will cooperate fully. If an occasion should arise on which, after consultation with the civil authorities, the Commanding General felt it necessary to take action under the provisions of paragraph 3, I should like to be informed of the circumstances under which such action was taken. I hope also that there will be a further restoration of civil authority as and when the situation permits.

Sincerely yours,

(S) FRANKLIN D. ROOSEVELT

Hon. Henry L. Stimson,
Secretary of War. [67]

EXHIBIT J

PROCLAMATION

U. S. Army
Headquarters Hawaiian Department.
Honolulu, Feb. 8, 1943.

To the People of Hawaii:

I, Delos C. Emmons, Lieutenant General, United States Army, as Commanding General, Hawaiian Department, and as Military Governor of Hawaii, do hereby proclaim:

1. Full jurisdiction and authority are hereby relinquished by the Commanding General to the Governor and other officers of the Territory of Hawaii, to the courts of that territory, to the city and county of Honolulu, to other counties, to all other officers of the territory or other persons acting under its authority, to the United States District Court for Hawaii, and to the appropriate officers of the United States, to exercise such powers as may now or hereafter be vested in them respectively by law over the following matters and others necessarily related thereto:

(a) Control of prices

(b) Rationing of commodities among the civilian population

(c) Control of hospitals, medical personnel, and medical supplies

(d) Food production by and distribution of food among the civilian population

(e) Control of rents

(f) Control of transportation and traffic by

land, except the movement of troops, military supplies and equipment, and except that the Commanding General may prescribe rules for the traffic during blackout hours

(g) Public health, sanitation, and prevention of disease among civilians

(h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations

(i) Judicial proceedings, both criminal and civil, except:

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect to any act or omission certified by the Commanding General to be in the line of duty. [68]

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the territory or, in the United States District Court for Hawaii, as the case may be.

(j) Control of imports for civilian consump-

tion and exports by civilians within allotments of tonnage made by the Commanding General.

(k) Censorship of mail from civilians in the territory

(l) Control of liquor and narcotics

(m) Schools and children

(n) The custody of alien property

(o) Collection and disposition of garbage, ashes, and other waste

(p) Banking, currency, and securities, provided that the Commanding General may prescribe the measures to be taken to prevent the enemy from obtaining securities or money or realizing upon them if he should obtain them

(q) Civilian defense activities, except that the Commanding General shall have jurisdiction to prescribe the duties of the Civilian Defense Corps, and to regulate and inspect their training

(r) Control of the supply, employment, hours, wages, and working conditions of labor, except as to (1) employees of the United States under the War Department or the Navy Department, (2) workers employed on construction and other projects under the War Department or the Navy Department, (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities. It is contemplated that the Commanding General and the Governor of Hawaii by mutual agreement will appoint a joint advisory committee, which shall from time to time consult and advise with each of them with reference to labor matters in their respective fields.

2. The Commanding General, Hawaiian Department, is charged with responsibility for the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations. For such purposes he shall continue, so far as he deems the military security of the territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are transferred to civil authorities pursuant to paragraph 1 of this proclamation.

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it necessary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a military emergency, to resume such of the functions and jurisdictions as are hereby or may hereafter be transferred to the civil authorities, or to issue such additional military orders, after consultation [69] with the Governor of the territory where civilian rights and the administration of the civilain government are affected, directing such action as in the judgment of the Commanding General may be required for the military security of the territory.

4. Neither this proclamation nor the revocation of orders announced in paragraph 5 hereof shall operate to invalidate any conviction, or any application of military orders to persons or activities, or any other action, which occurred prior to the effective date of this proclamation or such revocation.

5. This proclamation shall take effect thirty days after its date. Those parts of all military orders affecting the subjects enumerated in paragraph 1 hereof are hereby revoked effective thirty days after the date hereof.

DELOS C. EMMONS
Lieutenant General, U. S. Army, Commanding.
Military Governor of Hawaii. [70]

EXHIBIT K

Statement by the Governor

February 8, 1943

After numerous conferences among representatives of the War, Justice, Interior Departments and myself, it was agreed that martial law should be continued in Hawaii but that existing military control should be modified to restore to a large extent civilian control of civilian matters. My proclamation is the result of this agreement.

Under the Act of Congress the Governor is "responsible for the faithful execution of the laws of the United States and of the Territory" within the Territory. On December 7, 1941, the Governor of Hawaii issued a proclamation placing the Territory under martial law, which proclamation was subsequently modified by me on September 2nd, 1942. This proclamation issued today continues martial law and the suspension of the privilege of the writ of habeas corpus but modifies those prior proc-

lamations by restoring to the civil authorities jurisdiction in their respective fields over civilian affairs except for certain specified subjects which are primarily of military concern.

I am sure that the people of the Territory, as well as the civil and military authorities, will welcome this change. We of Hawaii believe that we, equally with the people of the mainland, are capable of governing ourselves in times of peril as well as in more tranquil times. Our military leaders, as they have many times made plain, are not anxious to assume the unfamiliar tasks of civil government.

We of Hawaii know the magnificent work done by the Army and Navy in making these Islands one of our principal offensive and defensive bases. [71] Yet the job does not stop there. The civilian population itself, in an outpost such as ours, must equally with the armed forces direct its every effort towards preparing for the day that the enemy might strike again.

In this, as in all civilian affairs, we will give the fullest cooperation to the military and naval authorities who are charged with the defense of our Islands. As Governor of Hawaii I propose, within my powers, to meet every request of those authorities by which our civilian government will aid the military preparations.

Our wartime duties do not stop with preparations to repulse the enemy. In common with the rest of America we must apply drastic measures to insure a fair distribution of a limited volume of supplies and we must do more work with less manpower. In

addition, we have special problems of our own. All of these difficulties can be overcome if each of us approaches the task with a firm determination and a spirit of willing cooperation. Here again, as Governor of Hawaii I shall use the powers given me by the Congress and by our Legislature, both to insure a vigorous attack on these problems and to cooperate to the fullest with the several Federal agencies having jurisdiction in these fields.

The effect of the resumption of the statutory duties of the Governor and the civil authorities places upon us a most solemn and important obligation. No one should expect that such resumption of civil authority will insure that the Territory will be governed without fault. I have no doubt that my own mistakes will number more than a few, but so far as it lies within my power and so far as it lies within my capacities, I shall exert every effort to make secure our Island home and to give the Territory an effective and impartial government.

INGRAM M. STAINBACH
Governor of Hawaii

Executive Chambers
Iolani Palace.

EXHIBIT L

In the District Court of the United States in and for the Territory of Hawaii

Habeas Corpus No. 298

In the Matter of the Application of

LLOYD C. DUNCAN

For a Writ of Habeas Corpus.

United States of America
Territory of Hawaii
City and County of Honolulu—ss.

I, C. W. Nimitz, Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas being first duly sworn on oath depose and say:

That I was graduated from the United States Naval Academy in 1905 as a Passed Midshipman and have been and still am on active duty in the United States Navy; that since that time I have received periodic promotion in rank including my promotion to the rank of Admiral on December 31, 1941; that on December 18, 1941 I was appointed Commander in Chief of the Pacific Fleet and assumed command thereof 31 December 1941, and thereafter I was appointed Commander in Chief of the Pacific Ocean Areas which said commands I have held continuously since the times of my appointments.

During the course of my active duty I have been assigned duty on the battleship Ohio, the light cruiser Baltimore, the gunboat Panay and the de-

stroyer Decatur. I have commanded the submarines Plunger, C-5, D-1 and E-1, and in May 1912 became group commander of the Atlantic submarine flotilla; thereafter I was assigned duty at the Navy Yard, New York, supervising the construction of Diesel engines, two of which were installed in the tanker Maumee, in which I served in 1916 as chief engineer and executive officer; thereafter in 1917-1918 I served on the [72] staff of Commander, Submarines, in the cruiser Chicago.

That in September 1918 I was assigned duty in the office of the Chief of Naval Operations, Washington, D. C., and in May 1919 returned to sea as executive officer of the battleship South Carolina.

In July 1920 I came to the Hawaiian Area as Commander Submarine Division 14 and as Commander, Submarine Base, Pearl Harbor.

Thereafter on June 1923 I graduated from the Naval War College and joined the staff of the Commander in Chief, Battle Fleet, Admiral S. S. Robison, with whom I continued as assistant chief of staff when Admiral Robison became Commander in Chief of the United States Fleet.

In 1929 I assumed command of Submarine Division 20 and from 1931 to 1933 commanded the Destroyer Base, San Diego; thereafter from 1933 to 1935 I commanded the heavy cruiser Augusta until 1935 when I became Assistant Chief of the Bureau of Navigation; thereafter in 1938 I assumed command of Battleship Division One, and remained on said command until detached in 1939 to become Chief of the Bureau of Navigation.

Based on my experience and observations gained through my official position in the Territory of Hawaii and the Pacific Ocean Areas since December 18, 1941, I make the following statements of fact and expressions of opinion:

1. That the Territory of Hawaii now is, and at all times since the attack thereon and the invasion thereof by the armed forces of the Empire of Japan on December 7, 1941, has been, an actual theater of the war between the United States and the Empire of Japan; that active military, naval, and air operations of said war now exist and are being conducted and have existed and continued in the said Territory [73] of Hawaii since the said attack thereon and invasion thereof on December 7, 1941, as aforesaid.

2. That it is my opinion that the said Territory of Hawaii now is and at all times since the attack thereon and the invasion thereof by the armed forces of the Empire of Japan on December 7, 1941, has been, in imminent danger of invasion by the armed forces and other agents and agencies of the Empire of Japan; that it is my opinion that the public safety of the Territory of Hawaii and of the United States now requires, and at all times since the said attack on and the said invasion of the said Territory of Hawaii by the said armed forces of the Empire of Japan on December 7, 1941, has required, that the privilege of the writ of habeas corpus be and remain suspended within the Territory of Hawaii and that the Territory of Hawaii be placed and remain under martial law;

that it is my opinion that the said suspension of the privilege of the writ of habeas corpus now is necessary, and has been necessary at all times since the said attack and invasion upon December 7, 1941, for the prosecution in the Territory of Hawaii by the United States of the war against the Empire of Japan; that it is my opinion that martial law now is necessary, and at all times since the said attack and invasion on December 7, 1941, has been necessary, for the prosecution in the Territory of Hawaii by the United States of the war against the Empire of Japan; that it is my opinion that the issuance and enforcement of the General Orders, numbers 1 to 53, issued by Robert C. Richardson, Jr., Lieutenant General, United States Army, in his capacity as the Commanding General, United States Army Forces, Central Pacific Area, and as the Military Governor of the Territory of Hawaii, between March 10, 1943, and [74] March 2, 1944, both dates inclusive, and the enforcement thereof, now are and at all times since the issuance thereof, were necessary for the prosecution in the Territory of Hawaii by the United States of the war against the Empire of Japan; that it is my opinion that the trial and conviction of Lloyd Clifford Duncan on March 2, 1944, by Arthur L. Mundo, Lieutenant Commander, United States Navy, (Ret.), Provost Court, Pearl Harbor, T. H., in Case No. 650-44 of said Provost Court, for a violation of Paragraph 8.01, Title 8, General Orders No. 2, Office of the Military Governor, 10

March 1943, and the imposition and execution of the sentence imposed upon said Lloyd Clifford Duncan in said case, were and are necessary for the prosecution in the Territory of Hawaii by the United States of the said war against the Empire of Japan.

/s/ C. W. NIMITZ
Admiral, U. S. Navy
Commander in Chief
U. S. Pacific Fleet and
Pacific Ocean Areas

Subscribed and sworn to before me this 22nd day of March, 1944.

/s/ NAT LOGAN SMITH
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires March 28, 1947. [75]

EXHIBIT M

In the District Court of the United States in and for the Territory of Hawaii

Habeas Corpus No. 298

In the Matter of the Application

of

LLOYD C. DUNCAN

For a Writ of Habeas Corpus.

United States of America
Territory of Hawaii
City and County of Honolulu—ss.

I, Robert C. Richardson, Jr., Lieutenant General,

United States Army, Commanding General, United States Army Forces, Central Pacific Area, being first duly sworn on oath depose and say:

That I was graduated from the United States Military Academy June 15, 1904, and commissioned a Second Lieutenant; that thereafter and at various times I received succeeding promotions in the United States Army including my promotion to the rank of Lieutenant General (temporary) on June 1, 1943.

That I served with the United States Army in the Philippines during which service I was engaged in the field against hostile forces at Jolo and participated in various engagements against the insurgents during the year 1905; that my service thereafter was within the continental United States until I was again ordered to the Philippines, where I served until March 4, 1912; that thereafter I returned to the continental United States where I served at various stations, including a tour of duty as an assistant professor at the United States Military Academy, until December 1, 1917, at which time I was ordered to France where I served as Aide and observer with foreign armies until January 9, 1918. [76]

I served with the Operations Division, General Staff, American Expeditionary Forces, to June 14, 1918; as Liaison Officer for G.H.Q. with Allied Headquarters and with American Armies, Corps and Divisions during the operations of 1918; escorted Allied Missions in St. Mihiel offensive; was Liaison Officer at Headquarers 1st Army, for open-

ing of Meuse-Argonne offensive; was representative of Operations Officer, at Advance General Headquarters, to January 28, 1919; served with Reparations Board, Peace Commission, Paris, France, to February 28, 1919; served on temporary duty at Headquarters, Third Army, Coblenz, Germany, and was attached to Headquarters, 10th French Army, Mayence, Germany, to June 1, 1919; returned to the United States on July 6, 1919, and served with the War Plans Division, War Department General Staff, Washington, D. C., to August 9, 1920; and in the office of the Chief of Cavalry, to January 28, 1921.

After approximately two years of further service in the Philippine Department I returned to the United States on April 6, 1923, and thereafter I attended the Command and General Staff School, Fort Leavenworth, Kansas, and the Ecole Superieure de Guerre, Paris, France. Thereafter I served as Military Attache, Rome, Italy, to March 21, 1928.

I was appointed Commanding Officer, Provisional Battalion, and Executive Officer, United States Military Academy, and served as such until March 2, 1929; and Commandant of Cadets and Head of the Department of Tactics to June 30, 1933. Thereafter I was graduated on June 30, 1934, from the Army War College, Washington, D. C., and served with the Military Intelligence Division, War Department General Staff, to December 7, 1935.

My commands thereafter included the 5th Cavalry at Fort Clark, Texas, until June, 1938, the 2nd Cavalry [77] Brigade at Fort Bliss, Texas.

On February 11, 1939 I was appointed as Commandant of the Cavalry School, Fort Riley, Kansas; commanded the 1st Cavalry Division, Fort Bliss, Texas; and on February 11, 1941 was appointed Director of the Bureau of Public Relations, Washington, D. C.

On July 17, 1941 I was assigned to command the VII Army Corps with headquarters at Birmingham, Alabama and later, after the outbreak of hostilities, was ordered to San Jose, California as Commanding General of the Northern California Sector of the Western Defense Command and VII Army Corps.

In May 1942 I was selected to represent the Chief of Staff on a tour of inspection in the Pacific during which I conferred with General MacArthur in Australia and visited Hawaii, New Caledonia and New Guinea.

On June 1, 1943 I assumed the command of the Hawaiian Department and the position of Military Governor of the Territory of Hawaii and thereafter on August 14, 1943, in compliance with a directive from the President, I assumed command of all United States Army forces in the Central Pacific Area which said command I held on 2 March 1944 and still hold.

In my official position as Commanding General, United States Army Forces, Central Pacific Area, I have access to and there is communicated to me Military and Naval information of a highly secretive and confidential nature relating to the prosecution of the war against the Empire of Japan by the

United States within this theater of war of which the Territory of Hawaii constitutes a part, and based thereon and my experience and observations in the Territory of Hawaii and the entire Central Pacific Area, I make the following statements of fact and expressions of opinion: [78]

1. That the Territory of Hawaii now is, and at all times since the attack thereon and the invasion thereof by the armed forces of the Empire of Japan on December 7, 1941, has been, an actual theater of the war between the United States and the Empire of Japan; that active land, naval, and air operations of said war now exist and are being conducted and have existed and continued in the said Territory of Hawaii since the said attack thereon and invasion thereof on December 7, 1941, as aforesaid.

2. That is it my opinion that the said Territory of Hawaii now is, and at all times since the attack thereon and the invasion thereof by the armed forces of the Empire of Japan on December 7, 1941, has been, in imminent danger of invasion by the armed forces and other agents and agencies of the Empire of Japan; that it is my opinion that the public safety of the Territory of Hawaii and of the United States now requires, and at all times since the said attack on and the said invasion of the said Territory of Hawaii by the said armed forces of the Empire of Japan on December 7, 1941, has required, that the privilege of the writ of habeas corpus be and remain suspended within the Territory of Hawaii and that the Territory of Hawaii be placed and remain under martial law;

that it is my opinion that the said suspension of the privilege of the writ of habeas corpus now is necessary, and has been necessary at all times since the said attack and invasion upon December 7, 1941, for the prosecution in the Territory of Hawaii by the United States of the war against the Empire of Japan; that it is my opinion that martial law now is necessary, and at all times since the said attack and invasion on December 7, 1941, has been necessary, for the prosecution in the Territory of Hawaii by the United States of the war against the Epmire of Japan; [79] that it is my opinion that the issuance of General Orders, Number 1 to 53, inclusive, issued by me in ~~my~~ capacity as the Commanding General, United States Army Forces, Central Pacific Area, and as the Military Governor of the Territory of Hawaii, between March 10, 1943, and March 2, 1944, both dates inclusive, and the enforcement thereof, now are and at all times since the issuance thereof, were necessary for the prosecution in the Territory of Hawaii by the United States of the war against the Empire of Japan; that it is my opinion that the trial and conviction of Lloyd Clifford Duncan on March 2, 1944, by Arthur L. Mundo, Lieutenant Commander, United States Navy (Ret.), Provost Court, Pearl Harbor, T. H., in Case No. 650-44 of said Provost Court, for a violation of Paragraph 8.01, Title 8, General Orders No. 2, Office of the Military Governor, 10 March 1943, and the imposition and execution of the sentence imposed upon said Lloyd Clifford Duncan in said case, were and are necessary for the

prosecution in the Territory of Hawaii by the United States of the said war against the Empire of Japan.

/s/ ROBERT C. RICHARDSON, Jr.
Lieutenant General, United States Army
Commanding General, United States Army Forces, Central Pacific Area

Subscribed and sworn to before me this 24th day of March, 1944.

/s/ N. F. JOHNSON
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires November 28, 1946. [80]

EXHIBIT N

Honolulu Star-Bulletin, Wednesday, March 10, 1943

GENERAL ORDERS OF THE MILITARY GOVERNOR TERRITORY OF HAWAII

The proclamations of February 8, 1943, provided for the relinquishment to the proper civilian authorities of a portion of the functions created and performed under my direction as Military Governor. Those proclamations also provided that those parts of all military orders affecting the functions so relinquished were to be revoked thirty days after the date of the proclamations.

Exhibit N—(Continued)

I have recognized that the rescission of some General Orders and the retention of others might confuse the public unless proper clarification is made of the General Orders which will continue in effect. Therefore, it has been considered advisable to rescind all previous General Orders of this office, effective March 10, 1943, and to issue a new series of General Orders codifying all regulations presently necessary. The new series consists of fourteen General Orders which are the only ones applicable in the Territory of Hawaii commencing this date, March 10, 1943. They are published herewith, grouped in one publication for convenience.

No district regulations will be published for separate islands; regulations applicable to one of the islands of the Territory and not to others, will be considered on the recommendation of the Commanding Generals of the respective districts and will be incorporated in the General Orders hereafter issued by this office.

It is recognized that amendments to these General Orders may be necessary and additional Orders may issue covering new subjects. These will appear in your newspapers from time to time.

It is, of course, difficult to promulgate regulations with the maximum of brevity and still convey the full contents of the desired policy. Any ques-

Exhibit N—(Continued)

tion of interpretation or any suggestions will be given prompt consideration.

DELOS C. EMMONS
Lieutenant General, United States Army
Commanding General, Hawaiian Department
Military Governor of the Territory of Hawaii.

General Orders No. 1
Appointment of Executive and Assistant Executive

General Orders No. 2
Courts and Commissions and Offenses Relating to the Administration of Justice

General Orders No. 3
Blackout

General Orders No. 4
Air Raid

General Orders No. 5
Civilian Security

General Orders No. 6
Aliens

General Orders No. 7
Military Areas

General Orders No. 8
Identification and Registration

General Orders No. 9
Communications

General Orders No. 10
Labor

Exhibit N—(Continued)

General Orders No. 11
Military Property

General Orders No. 12
Travel

General Orders No. 13
Rescission of General Orders Nos. 1 to 181, Inclusive, Saving Clause, and Effective Date of General Orders Nos. 1 to 14, Inclusive, This Office, Dated 10 March 1943

General Orders No. 14
Organization of the Office of the Military Governor

10 March 1943

GENERAL ORDERS No. 1

1. Executive.

1.01 Thomas H. Green, Bridgadier General, A.U.S., hereby is appointed Executive of the Military Governor.

2. Assistant Executive.

2.01 William R. C. Morrison, Colonel, J.A.G.D., hereby is appointed Assistant Executive of the Military Governor.

DELOS C. EMMONS
Lieutenant General, United States Army
Commanding General, Hawaiian Department
Military Governor of the Territory of Hawaii

Exhibit N—(Continued)

10 March 1943

GENERAL ORDERS No. 2

Courts and Commissions and Offenses
Relating to the Administration of Justice

1. Martial Law and the Writ of Habeas Corpus.
2. Civil Courts.
3. Provost Courts and Military Commissions.
4. Military Commissions.
5. Provost Courts.
6. Provost Court Commissioner.
7. Attempts and Conspiracies to Violate a General Orders.
8. Interference with Military Police and Personnel.
9. False Statements to, or Misusing Authorizations Granted by, Agencies of the Military Governor.
10. Power of Civilian Police Officer to Make Arrests for Violation of General Orders of the Military Governor.
11. Definition of "Person."
12. Prosecution of Offenses under Rescinded General Orders.

1. Martial Law and the Writ of Habeas Corpus.

1.01. A state of marital law remains in effect and the privilege of the writ of habeas corpus has been, and remains, suspended.

2. Civil Courts (Pursuant to Proclamations of February 8, 1943).

Exhibit X—(Continued)

2.01 Civil courts are authorized to exercise their normal jurisdiction as provided by law, except that such courts shall not have jurisdiction of the following:

Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General, Hawaiian Department, to be in the line of duty;

Civil suits against members of the armed forces, as defined above, in respect of any act or omission certified by the Commanding General, Hawaiian Department, to be in the line of duty;

Criminal prosecutions for violations of military orders.

2.02. The Commanding General, Hawaiian Department, may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the territory or in the United States District Court for Hawaii, as the case may be.

3. Provost Courts and Military Commissions.

3.01. Provost Courts and Military Commissions shall have jurisdiction and power, and hereby are authorized and empowered, to try and determine any case, matter, or proceeding involving any violation or violations by a civilian or civilians of the rules, regulations, proclamations, or Orders of the

Exhibit N—(Continued)

Military or Naval authorities, or of the Military Governor of the Territory of Hawaii, or of the laws of war; and, such Provost Courts and Military Commissions in addition to the power to impose upon or against any person or persons charged or tried in any such case, matter, or proceeding, the penalties, forfeitures, and similar punishment otherwise authorized by the General Orders of the Military Governor, shall have power, and hereby are authorized and empowered, to punish any such person or persons committing such violation or violations, or offense or offenses, by fine or imprisonment with or without hard labor, or by both such fine and imprisonment, as may be ordered or provided in the General Orders of the Military Governor. Such Provost Courts or Military Commissions shall have jurisdiction, and power, and hereby are authorized and empowered, to try and punish members of the Armed Forces of the United States only for violations of any statute of the Territory of Hawaii, or of any ordinance, resolution, by-law, regulation, or rule of any city, city and county, county, or other municipal corporation or political subdivision of the Territory of Hawaii, or of any order, regulation, or rule of the Military or Naval authorities or of the Military Governor of the Territory of Hawaii, regulating or relating to vehicular or pedestrian traffic. The concurrent jurisdiction of the Armed Forces of the United States to court-martial or otherwise discipline commissioned or enlisted per-

Exhibit N—(Continued)

sonnel of their respective services for such traffic offenses is not withdrawn by anything herein contained.

3.02. Charges involving major offenses shall be referred to a Military Commission for trial and determination, unless otherwise ordered by the Military Governor of the Territory of Hawaii. Other cases involving charges of lesser degree shall be tried and determined by Provost Courts. Military Commissions and Provost Courts will adjudge appropriate sentences commensurate with the offense. In adjudging such sentences, Provost Courts and Military Commissions will be guided by, but not limited to or bound by, the penalties provided by the Courts-Martial Manual, the laws of the United States, the laws of the Territory of Hawaii, the laws of the District of Columbia, county, and city and county ordinances, and the customs of law in like cases. The maximum fine or confinement, or both fine and confinement, which a Provost Court may adjudge as punishment, is confinement with or without hard labor for a period not to exceed five (5) years, or a fine not to exceed five thousand dollars ($5,000.00), or both such confinement and fine. The foregoing limitation on the fine or confinement, or fine and confinement, that a Provost Court may adjudge, shall not restrict the power and authority of such a Provost Court to order and direct the confiscation and destruction of property, the suspension, cancellation, or revocation of licenses, or such other penalties or sentences in

Exhibit N—(Continued)

addition to such fine or confinement, or both, as may be provided by this or any other General Orders of the Military Governor. Military Commissions may adjudge confinement with or without hard labor for any number of years, or for life, or may adjudge the death penalty, and may impose fines with or without such confinement, in any case tried and determined by a Military Commission. The sentences adjudged by a Provost Court shall become effective immediately. The sentence adjudged by a Military Commission shall not become effective until it shall be have been approved by the Military Governor.

3.03. Any person who fails, neglects, or refuses to comply with any subpoena, summons, citation, notice, warrant of arrest, commitment, order of commitment, or other process, issued by a Provost Court, a Military Commission, the Trial Judge Advocate of a Military Commission, or by any duly authorized agent or representative of such a Provost Court or Military Commission, or who uses any menacing words, signs or gestures in the presence of a Provost Court or Military Commission, or who disturbs the proceedings of a Provost Court or Military Commission by a riot or disorder or in any manner, or who in any manner or way wilfully disobeys any rule or order of a Provost Court or Military Commission, shall be deemed to be guilty or contempt of such Provost Court or Military Commission, and may be tried and punished for such contempt by such Provost Court or Mili-

Exhibit N—(Continued)

tary Commission summarily or as such Provost Court or Military Commission may otherwise determine.

3.04. Provost Courts and Military Commissions, in addition to the power to impose a fine or confinement, or both such fine and confinement, as otherwise authorized in this General Orders or any other General Orders of the Military Governor of the Territory of Hawaii, upon conviction of a person for a violation of a General Orders of the Military Governor or for any offense that may be tried and determined by such Provost Courts or Military Commissions, shall have power and hereby are authorized and empowered to suspend, cancel, or revoke, or direct or order the suspension, cancellation, or revocation of any license, franchise, or permit of a personal nature issued by the Military Governor or any agent or representative thereof to the person so convicted, and also shall have power and hereby are authorized and empowered, upon conviction of any person as aforesaid, to suspend, cancel, or revoke, or order or direct the suspension, cancellation, or revocation of, any license, permit, or franchise of a personal nature issued to such person so convicted by any federal or territorial officer, department, agent or agency, or by any department, officer, agent or agency of any municipal corporation or other political subdivision within the Territory of Hawaii.

3.05. In all cases of violation of any provision of any General Orders of the Military Governor,

Exhibit N—(Continued)

where no other or different provision for fine or confinement or both is provided by such General Orders, the maximum fine or confinement, or both fine or confinement, that a Provost Court may impose, shall be a fine not to exceed five thousand dollars ($5,000.00), or confinement with or without hard labor not to exceed five (5) years, or both such fine and confinement. The limitations on punishment in any General Orders defining an offense and providing a punishment for such offense shall not be deemed a limitation upon the punishment or sentence that a Military Commission may impose if such offense be tried and determined by a Military Commission rather than by a Provost Court.

3.06. Provost Courts and Military Commissions hereby are authorized and empowered to forfeit or confiscate or to order or direct the forfeiture or confiscation or other disposition of any personal property used, or having for its sole purpose use, in the commission of a violation of any of the provisions of any of the General Orders of the Military Governor now in full force and effect or hereafter enacted or issued.

3.07. Provost Courts hereby are authorized, empowered, and directed, and Military Commissions hereby are authorized and empowered in their discretion, to admit persons arrested for or charged with an offense triable by such Provost Courts or Military Commissions to cash bail, to fix and accept said bail, provided, however, that such bail shall not be excessive, to determine the conditions sub-

Exhibit N—(Continued)

ject to which such bail may be or is furnished, and to order and direct forefeiture thereof, and the manner in which the said bail may be forfeited. The police departments of any county, or city and county, within the Territory of Hawaii, when authorized, impowered, and directed to do so by the Military Governor of the Territory of Hawaii, may also fix and accept bail for offenses triable by such Provost Courts. Bail may be set by the Provost Court Commissioner.

3.08. The record of trial in cases before Military Commissions will be substantially similar to that required in a general courts-martial. The record of trial in cases before Provost Courts will be substantially similar to that in the case of a summary courts-martial. The procedure in trials before Military Commissions and Provost Courts will follow so far as it is applicable, the procedure required by general and summary courts-martial respectively. The records of trial in all cases will be forwarded to the Office of the Military Governor.

3.09. All charges brought in the Provost Courts or before Military Commissions shall be preferred by either the Provost Marshal, Hawaiian Department, the Provost Marshal of a Military district within said Hawaiian Department, or such deputies or assistants of said Provost Marshals and such other persons as first shall be approved by the Military Governor. The Provost Court Commissioner

Exhibit N—(Continued)

is responsible for the prompt trial of all prisoners in Provost Courts or before Military Commissions, and the Provost Marshals shall be responsible for carrying out the sentence adjudged by the Court or Commission.

4. Military Commissions.

4.01. A Military Commission hereby is appointed to meet at such times and places within the Territory of Hawaii as the President of said Military Commission may direct, for the trial of such persons as may be properly brought before it.

4.02. The following persons shall comprise the detail for said Military Commission:

Major General James A. Woodruff, U.S.A., President and Law Member.
Col. John H. Howard, U.S.A.
Lt. Col. Virgil G. Allen, General Staff Corps.
Lt. Col. Ray O. Welch, Ordnance Department.
Lt. Col. Moe D. Baroff, Infantry.
Major Eugene V. Slattery, J.A.G.D., Trial Judge Advocate.
Lt. Col. Harrison M. Coppin, A.G.D., Defense Counsel.
Captain Sam B. Thomas, C.M.P., Assistant Defense Counsel.

4.03. The defendant in any case tried before said Military Commission may retain and introduce individual counsel of his own selection to represent him in said proceedings.

Exhibit A (Continued)

5. Provost Courts.

5.01. Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly be brought before the court, at the respective places as hereinafter designated, viz.:

At Hilo, Hawaii, T. H.
Col. Arthur C. Huston, Jr., Inf.
Captain William A. E. King, J.A.G.D.
1st Lt. Woolbridge B. Morton, Jr., F.A.

At Honolulu and Kaneohe, Oahu, T. H.
Col. John H. Howard, U.S.A.
Lt. Col. Moe D. Baroff, Inf.
Major Eugene V. Slattery, J.A.G.D,
Captain John F. Wickhem, J.A.G.D.

At Lihue, Kauai, T. H.
Major Charles A. Fisher, Inf.

At Lanai City, Lanai, T. H.
Arthur W. Carlson.

At Wailuku, Maui, T. H.
Major Merryl G. Shaver, J.A.G.D.

At Kaunakakai, Molokai, T. H.
Major Merryl G. Shaver, J.A.G.D.

At Palmyra Island, T. H.
The Commanding Officer, United States Nayal Air Station.

At Schofield Barracks and Pearl City, Oahu, T. H.
Lt. Col. Henry DuPree, Inf.

Exhibit N—(Continued)

6. Provost Court Commissioner.

6.01. There is hereby created the office of Provost Court Commissioner for the Territory of Hawaii.

6.02. The powers and duties of such Provost Court Commissioner shall be as follows:

To establish a method of process for Provost Courts and Military Commissions and to prepare and recommend rules and regulations of procedure to be promulgated by the Military Governor;

To have charge of and be responsible for, acting under the direction of the Military Governor, the prosecution of all cases before the Provost Courts, and to appear in and prosecute such cases personally or through prosecutors selected from those duly designated and approved pursuant to Paragraph 3.09 of this General Orders No. 2 to prefer charges; provided, however, that the said Provost Court Commissioner may at any time that he elects to do so appear in, take over, and prosecute any case before the Provost Courts at any stage of the proceedings in such case;

To supervise and coordinate the operations and activities of the Provost Courts and Military Commissions, including the assignment of cases and determination of questions of jurisdiction;

To coordinate the operations and activities of such Provost Courts and Military Commissions with the activities of the federal and territorial courts, so that a full, complete and expeditious administration of justice may be had and main-

Exhibit N—(Continued)

tained in the Territory of Hawaii during the present emergency;

To have the power of administering oaths or affirmations and to have all other powers necessary or incidental to an efficacious accomplishment of the foregoing duties;

To perform such other duties and functions and exercise such other powers as may from time to time be directed or authorized by the Military Governor.

6.03. Edward N. Sylva, Captain, J.A.G.D., hereby is appointed the Provost Court Commissioner for the Territory of Hawaii and assigned to duty as such Provost Court Commissioner in addition to his other duties.

7. Attempts and Conspiracies to Violate a General Orders.

7.01. An attempt to commit a violation of a General Orders of the Military Governor or any offense triable by a Provost Court or a Military Commission is some act done towards committing and in part execution of the intent to commit the same. No person, firm, corporation, or other association or group of persons, shall attempt to commit a violation of any provisions of a General Orders of the Military Governor, or attempt to commit any offense triable by a Provost Court or a Military Commission.

7.02. A conspiracy is a wilful or malicious combination or mutual undertaking or concerting together of two or more persons to commit a viola-

Exhibit N—(Continued)

tion of a General Orders of the Military Governor, or any offense triable by a Provost Court or a Military Commission, or instigate any other person thereto; or to do what plainly and directly tends to excite or occasion such a violation. No person shall conspire to violate any provision of a General Orders of the Military Governor, or attempt to commit any offense triable by a Provost Court or a Military Commission.

7.03. Any person knowingly acceding to and joining in a conspiracy after the same is formed, is a party thereto, no less than the one who originally takes part in forming the same. The act of each party to a conspiracy, in pursuance thereof, is the act of all. It shall not be necessary that the act agreed upon shall be done or attempted in pursuance of the conspiracy, as the conspiracy, itself, constitutes the offense.

8. Interference With Military Police and Personnel.

8.01. No person shall commit an assault or an assault and battery on any military police, any member of the shore patrol, or other military or naval personnel, with intent to resist, prevent, hinder, or obstruct him in the discharge, execution, or performance of his duty as such, nor shall any person wilfully interfere or attempt to interfere with any military police, any member of the shore patrol, or other military or naval personnel in the performance of his official, defined, or required duties as such.

Exhibit N—(Continued)

8.02. No person shall commit an assault or an assault and battery on a federal, territorial or municipal police officer with intent to resist, prevent, hinder, or obstruct said police officer in the arrest of a person violating, or charged with a violation of, any General Orders of the Military Governor, or for any offense that may be tried and determined by a Provost Court or Military Commission, nor shall any person wilfully interfere with any such federal, territorial, or municipal police officer in the performance of any duties imposed upon such police officer, or which the said police officer is authorized or empowered to perform by any General Orders of the Military Governor.

8.03. No person, who is or has been made prisoner, or now or hereafter is detained, on conviction or charge of any offense defined by any General Orders of the Military Governor, or triable by a Provost Court or Military Commission, shall escape from imprisonment or detention against the will of the officer or person having him in custody or against the will or consent of the Military Governor.

8.04. No person shall, after another person has committed an offense constituting a violation of any of the General Orders of the Military Governor, or a violation that may otherwise be tried and determined by a Provost Court or a Military Commission, harbor, conceal, or aid such other person, with knowledge or having good reason to believe

Exhibit N—(Continued)

that such other person has committed such offense, and with the intent that such other person may avoid or escape from arrest, trial, conviction, or punishment for such offense.

9. False Statements to, or Misusing Authorizations Granted By, Agencies of the Military Governor.

9.01. Definition of "Office of the Military Governor." The term "Office of the Military Governor," as used herein shall include, and hereby is defined to mean, any of the following, to wit:

The Military Governor of the Territory of Hawaii;

The agencies, agents, committees, departments, directors, divisions, employees, sections, and all other personnel, included within the organization of the Office of the Military Governor;

Any representative of the Military Governor not specifically included or mentioned in the subdivision immediately above; and

The successor or successors, if any, of any of those included or mentioned within the three subdivisions immediately above.

9.02. Definition of "Statement." The term "statement," as used herein, shall include, and hereby is defined to mean, any of the following, to wit: Account, affidavit, oral or written application, bill, claim, deposition, document, form, instrument, letter, oral or written report, oral or written representation, roll, voucher, or any document, instrument, or oral or written statement not specifically mentioned heretofore in this sentence.

Exhibit N—(Continued)

9.03. Definition of "Authorization." The term "authorization," as used herein, shall include, and hereby is defined to mean, any approval, certificate, permit, release, license, order, parole, commutation or suspension of sentence, power, privilege, waiver, or other document or instrument, authorized, granted, or issued, or that may be authorized, granted, or issued, by the Office of the Military Governor.

9.04. No person, firm, or corporation, shall, in any matter within the jurisdiction of the Office of the Military Governor, wilfully falsify, or wrongfully or fraudulently conceal to cover up by any trick, scheme, or by any act of omission or commission, any fact concerning said matter. No person, firm, or corporation, shall make or cause to be made, or present or cause to be presented, to the Office of the Military Governor, any false, fictitious, misleading, evasive, or fraudulent statement, for the purpose of securing, obtaining, or receiving any authorization, payment of money, or any consideration or determination of any matter by the Office of the Military Governor, or for any purpose whatsoever, knowing or having reason to believe such statement to be false, fictitious, misleading, evasive, or fraudulent in whole or in any part, particular, or item thereof, or without having good and substantial reason to believe such statement to be true and correct in whole and in every part, particular, and item thereof.

Exhibit N—(Continued)

9.05. No person, firm, or corporation, shall receive or obtain, or cause to be received or obtained, from the said Office of the Military Governor, any authorization for any purpose or use other than that purpose or use for which it was granted, authorized, issued, or intended by the said Office of the Military Governor; and no person, firm, or corporation, who or which shall have received or obtained any authorization from the Office of the Military Governor, shall use or employ, or allow, permit, or cause to be used or employed, the authorization so obtained, for any purpose or use other than that for which it was granted, authorized, issued, or intended by said Office of the Military Governor; and no person, firm, or corporation, who or which shall have obtained any materials, fixtures, goods, wares, merchandise, or any other personal property, by means of or pursuant to any authorization, shall employ, use, or dispose of, any of the said materials, fixtures, goods, wares, merchandise, or other personal property, for any purpose, use, or disposition, other than that purpose, use, or disposition authorized by the authorization by means of or pursuant to which ownership or possession of said property was obtained or is held by said person, firm, or corporation, unless such person, firm, or corporation is authorized in writing by the Office of the Military Governor to so otherwise use, employ, or dispose of said property.

Exhibit N—(Continued)

9.06. No person who shall have taken an oath or affirmation in a trial or any proceeding before a Provost Court or a Military Commission appointed by the Office of the Military Governor of the Territory of Hawaii, or in connection with any affidavit, deposition, or other instrument or document intended to be used or actually used in any such trial or proceeding, shall wilfully swear or affirm falsely in regard to any matter or thing, whether material or immaterial, during such trial or other proceeding, or concerning which, such trial or other proceeding is being had by said Provost Court or said Military Commission or wilfully swear or affirm falsely in regard to any matter or thing, whether material or immaterial, contained in such affidavit, deposition, or other instrument or document.

9.07. Any person, firm, or corporation who or which violates, refuses, fails, or neglects to comply with any of the provisions of this Title 9 of this General Orders, or who or which evades or attempts to evade any of the provisions of this Title 9, upon conviction thereof, if a natural person, shall be punished by confinement, with or without hard labor, not to exceed five (5) years, or by a fine not to exceed five thousand dollars ($5,000.00), or by both such confinement and fine, or if a corporation or other than a natural person, by a fine not to exceed five thousand dollars ($5,000.00).

9.08. The provisions of this Title 9 of this General

Exhibit N—(Continued)

Orders shall be in addition to any provisions contained in any other General Orders. If any act or acts prohibited by this Title 9 also is or are prohibited by or made a violation or violations of any other General Orders, the offender may be convicted or punished or convicted and punished, for a violation of either this Title 9 or such other General Orders.

10. Power of Civilian Police Officer to Make Arrests.

10.01. All law enforcement officers of the United States, police officers of the Territory of Hawaii, all police officers of all municipal corporations and other political subdivisions within the Territory of Hawaii, and all other public officers of public employees granted power or authority to make arrests by the laws of the United States, by the laws of the Territory of Hawaii, or by the ordinances, rules, or regulations of any municipal corporation or other political subdivision or department of or within the Territory of Hawaii, hereby are authorized, empowered, directed, and ordered to forthwith arrest, without warrant of arrest, all persons who, in the presence of such police officers or persons so authorized to arrest, commit any violation of any General Orders of the Military Governor now in full force and effect or hereafter enacted or issued, or any offense triable by a Provost Court or a Military Commission. No cause of action or claim for damages against such police officer or person making such arrest shall accrue in favor of any person arrested as authorized or provided

Exhibit N—(Continued)

herein, provided, however, that no more force be used by such police officer or person in effecting such arrest than is authorized by law. No person arrested by any of the said law-enforcement officers, police officers, public officers, or public employees, for any violation of any General Orders of the Military Governor now in full force and effect or hereafter enacted or issued, or for any offense triable by a Provost Court or a Military Commission, shall file, commence, institute, maintain, or prosecute any complaint, petition, suit, action, or other proceedings for false arrest, false imprisonment, or for any other cause, reason, or purpose whatsoever, arising out of or because of the fact that such person was arrested by said law-enforcement officers, police officers, public officers, or public employees, for any such violation or offense; nor shall any person allow or permit any complaint, petition, suit, action, or other proceedings for false arrest, false imprisonment or for any other purpose whatsoever arising out of or because of the fact that such person was arrested by said law-enforcement officers, police officers, public officers, or public employees, for any such violation or offense, to be filed, commenced, instituted, maintained or prosecuted.

11. Definitions of "Person."

11.01. Unless otherwise clearly indicated in the General Orders in which used, the term "person," as used in any General Orders of the Military Governor, shall include, and hereby is defined to mean,

Exhibit N—(Continued)

any natural person or persons, firms, associations, trusts, corporation or corporations, or any agent, servant, employee, or representative of any of the foregoing.

12. Prosecution of Offenses Under Rescinded General Orders.

12.01. It is expressly provided that no revocation or rescission of General Orders of and by the Military Governor, nor any proclamation issued by the Military Governor, shall operate to invalidate any conviction, or any application of such military orders to persons or activities, and Provost Courts and Military Commissions hereby are expressly authorized and empowered to try and determine any proceeding for violation of a provision of a General Orders of the Military Governor at any time hereafter, notwithstanding any such rescission or revocation, heretofore or hereafter made, for an offense committed while such General Orders remained in full force and effect.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

10 March 1943

GENERAL ORDERS NO. 3

Blackout

1. Hours of Blackout.
2. Use and Control of Lights During Hours of Blackout.

Exhibit N—(Continued)

3. Motor Vehicle Blackout.
4. Traffic During Hours of Blackout.
5. Workers Going to Work in the Morning.
6. Personal Identification During Hours of Blackout.
7. Places of Amusement and Business.
8. Enforcement.

1. Hours of Blackout.

1.01. City and County of Honolulu, District of Maui, District of Kauai, and District of Lanai-Molokai. The hours of blackout for the City and County of Honolulu, the District of Maui, the District of Kauai, and the District of Lanai-Molokai shall be as set forth in the following schedule for the periods of time indicated:

Dates				Hours	
From		Through		From	To
10 March	1943	14 March	1943	7:30 p.m.	7:00 a.m.
15 March	1943	31 March	1943	7:45 p.m.	6:45 a.m.
1 April	1943	14 April	1943	7:45 p.m.	6:30 a.m.
15 April	1943	30 April	1943	7:45 p.m.	6:15 a.m.
1 May	1943	31 May	1943	8:00 p.m.	6:00 a.m.
1 June	1943	31 July	1943	8:15 p.m.	6:00 a.m.
1 August	1943	31 August	1943	8:06 p.m.	6:15 a.m.
1 September	1943	14 September	1943	7:45 p.m.	6:15 a.m.
15 September	1943	30 September	1943	7:30 p.m.	6:30 a.m.
1 October	1943	14 October	1943	7:15 p.m.	6:30 a.m.
15 October	1943	31 October	1943	7:00 p.m.	6:30 a.m.
1 November	1943	14 November	1943	7:00 p.m.	6:45 a.m.
15 November	1943	14 December	1943	6:45 p.m.	7:00 a.m.
15 December	1943	14 January	1944	7:00 p.m.	7:15 a.m.

1.02. District of Hawaii. The hours of blackout for the District of Hawaii shall be as set forth in the following schedule for the periods of time indicated:

Exhibit N—(Continued)

Dates				Hours	
From		Through		From	To
10 March	1943	14 March	1943	7:15 p.m.	6:45 a.m.
15 March	1943	31 March	1943	7:30 p.m.	6:30 a.m.
1 April	1943	14 April	1943	7:30 p.m.	6:15 a.m.
15 April	1943	30 April	1943	7:30 p.m.	6:00 a.m.
1 May	1943	31 May	1943	7:45 p.m.	5:45 a.m.
1 June	1943	31 July	1943	8:00 p.m.	5:45 a.m.
1 August	1943	31 August	1943	7:45 p.m.	6:00 a.m.
1 September	1943	14 September	1943	7:30 p.m.	6:00 a.m.
15 September	1943	30 September	1943	7:15 p.m.	6:15 a.m.
1 October	1943	14 October	1943	7:00 p.m.	6:15 a.m.
15 October	1943	31 October	1943	6:45 p.m.	6:15 a.m.
1 November	1943	14 November	1943	6:45 p.m.	6:30 a.m.
15 November	1943	14 December	1943	6:30 p.m.	6:45 a.m.
15 December	1943	14 January	1944	6:45 p.m.	7:00 a.m.

2. Use and Control of Lights During Hours of Blackout.

2.01. General Restriction. During the hours of blackout, the use of exterior lights and interior lights which are visible on the outside of buildings, houses, or other structures is forbidden, except as is authorized by this General Orders.

2.02. Controlled Illumination. To provide a small amount of controlled illumination in homes and buildings sufficient to permit reasonable facility of movement without necessitating complete blackout of doors, windows and other openings, the use of limited lighting is authorized.

2.03. The following special requirements are prescribed for lamp bulbs used in the controlled lighting authorized in paragraph 2.02 above:

Watts—not more than 25 watts.

Exhibit N—(Continued)

Volts—220 to 240 volts to operate on 110 to 120-volt systems.

Base—medium screw.

Bulb—A19 Mazda or equal and internally frosted.

Bulb Coating—opaque except for circular aperture on bulb end.

Circular Aperture—maximum diameter 1 inch.

Opaque Coating Material—resistant to scratching or removal.

2.04. The following regulations are prescribed for the use of these lamp bulbs:

In small or medium-sized rooms (less than 200 square feet of floor area) only one lamp bulb shall be used per room.

In larger rooms and in corridors not more than one lamp bulb shall be used for each 200 square feet of floor area.

When more than one lamp bulb is used, the lamp bulbs shall be spaced at least 10 feet apart.

Lamp bulbs shall be placed at least 3 feet from any window, exterior door or opening and pointed towards the floor or ceiling.

Lamp bulbs shall not be pointed toward any window, exterior door or other opening or mirror.

These lamp bulbs in no case shall be used on the outside of buildings except on the approval of the Provost Marshal. They will not be used on lanais except on the written approval of the local Air Raid Warden.

Exhibit N—(Continued)

2.05. The use of the lamps authorized in this Title is not compulsory, but in the event they are not used, all blackout rules and regulations of the Military Governor shall be strictly observed.

2.06. Piers, Factories and Other Facilities. Any person, firm, or corporation who or which desires to operate and maintain any pier, factory or other facilities during the hours of blackout, shall make application to the Provost Marshal, Hawaiian Department, or the District Provost Marshal for special permission to do so.

2.07. Observation of Maximum Blackout in Piers, Factories, and Other Facilities. Any person, firm, or corporation who or which has been granted special permission by the Provost Marshal, Hawaiian Department, or the District Provost Marshal to operate and maintain any pier, factory, or other facilities during the hours of blackout, shall observe the maximum blackout consistent with the work to be done.

2.08. Special Blackout Regulations for Piers, Factories, and Other Facilities. In observing the maximum blackout consistent with the work to be done in any pier, factory, or other facilities authorized to be operated and maintained during hours of blackout pursuant to this General Orders, the following rules and regulations shall be complied with, in addition to any other provisions of the General Orders of the Military Governor relating to, or pertaining to, blackout restrictions:

Exhibit N—(Continued)

Windows shall be painted or otherwise blacked-out, so as not to emit any light.

Entrances and exits of such structures will be opened only to the extent necessary for the ingress and egress of persons and the movement of materials.

The minimum amount of illumination consistent with the efficient operation of such pier, factory, or other facilities will be used.

Lights which are authorized to be burned in piers, factories, and other facilities during the hours of blackout shall be shaded, insofar as possible, to throw the illumination downward only, so as not to be directly visible from the air or outside.

2.09. Private Incineration. No person, firm, or corporation shall destroy, by burning, any refuse, waste, garbage, rubbish, paper, sticks, or any other matter out-of-doors, nor shall any private incineration be engaged in or allowed out-of-doors, during the hours of blackout or for one hour previous to blackout, except on written authority of the Provost Marshal.

2.10. Carrying Lighted Cigarettes, Cigars and Pipes in the Open During Hours of Blackout. The carrying of lighted cigarettes, cigars, and pipes in the open and the use of matches and lighters in the open for the purpose of lighting cigarettes, cigars, and pipes, during the hours of blackout, except during air raids, air raid alarms and attacks, hereby is permitted.

Exhibit N—(Continued)

3.09. Fire Department Trucks. All lights on Fire Department trucks will conform to specifications set forth herein, except that the white light slot of the headlights may be one-half (½) inch wide by three (3) inches long.

If needed, Fire Department trucks may use a hooded white spotlight when going to a fire during peaceful times, but when returning from a fire, the headlights prescribed above, will be used. In case of a blitz or other emergency situation, no spotlights will be used. The hood for the white spotlight will encircle the circumference of the light and be at least two (2) inches longer than the diameter of the lens of the spotlight.

3.10. Ambulances, Doctors' Vehicles, and Utility Vehicles. All lights of ambulance and utility vehicles will conform to specifications set forth herein except that the white light slot of the headlights may be three-eighths (⅜) inch wide by three (3) inches long.

All lights on motor vehicles owned and operated by or by direction of, or under the supervision of, a physician or surgeon, in the practice of his profession will conform to the specifications set forth herein, except that the white light slot of the headlights may be one-fourth (¼) inch wide by two (2) inches long.

When responding to emergency calls, ambulances and utility vehicles may use a hooded white spotlight during peaceful times, if needed, but when returning to their stations, only the headlights pre-

Exhibit N—(Continued)

scribed will be used. In case of a blitz or other similar emergency situation, no spotlight will be used. The hood will encircle the circumference of the spotlight and will be at least two (2) inches longer than the diameter of the lens of the spotlight.

3.11. Lumber Carriers. Headlights on lumber carriers will conform to specifications set forth herein, with the following exceptions:

White light slot on the headlights may be three-fourths (¾) inch wide by three (3) inches long;

The outer edge of the metal shield will not have the lip prescribed for other vehicles;

With the vehicle on level surface, the headlights shall be so adjusted that the bottom of the slot is horizontal and so aimed that the visual cut-off up the top of the beam of a vertical screen thirty (30) feet in front of lamp is not higher than fifty-three (53) inches from the road level; and

The tail light may be mounted at the same height as the headlights.

Lumber carriers will be allowed to have one hooded white spotlight on the front of the carrier, at the top and one one hooded spotlight on the rear left side, near the seat of the operator. In peaceful times, these spotlights may be used when carrying loads of unusual length (over thirty-five (35) feet) when loading or unloading, and when maneuvering the vehicle in unusually difficult places. In case of a blitz or other similar emergency situation, no spotlight will be used. The hood will encircle

Exhibit N—(Continued)

2.11. Flashlights. Flashlights may be used during the hours of blackout. Except as is otherwise authorized in this paragraph, all flashlights shall be painted or otherwise fixed so as to give off a blue light. Military Police and members of the Civilian Police Department on night duty are authorized to use orange or red cellophane, paint, or other material, so as to give off a red or orange light, on the lens of their flashlights. Air Raid and Fire Wardens on night duty are authorized to use green cellophane, paint, or other materials, so as to give off a green light, on the lens of their flashlights.

2.12. Excessive Illumination. No person, firm, or corporation shall use, or cause to be used, excessively, any means of illumination during the hours of blackout.

2.13. Extinguishment of Lights During Air Raid and Other Attacks. No person, firm, or corporation shall, in case of an air raid, air raid alarm, attack, or invasion, during the hours of blackout, burn, or cause to be burned, any lights which will be visible out-of-doors, nor shall any person, firm, or corporation rekindle or turn on again such lights until the "All Clear" signal is sounded.

2.14. Businesses and other activities operating at night in the Kauai District, in such a manner as to require the use of outside lighting, shall comply with the following special blackout regulations:

Plantations requesting permission to engage in night harvesting, must be equipped with operating lights so constructed that no beam of light will be

Exhibit N—(Continued)

projected upwards. The lights used will be of minimum intensity necessary for operations and safety to personnel involved.

One or more radio receiving sets sealed to Station KTOH, with an operator constantly in attendance, will be continuously tuned to the Station in the immediate vicinity of any night harvesting project in order that all lights may be extinguished wtihout delay in the event an air raid or other warning should be broadcast.

Prior to the conducting of any authorized night harvesting operations by plantations, the Plans and Training Officer, District Headquarters, Kalaheo, Kauai, will be advised in order that the proper military and naval authorities may have knowledge of the locations in which lights will be exposed.

All other businesses or activities requesting permission to violate blackout regulations will comply with the above requirements with respect to the amount and type of outside lighting used, and a radio or other approved means of communication will be immediately available for the reception of notices to extinguish lights. Upon receipt of any application for permission to operate in violation of blackout restrictions subject to the above provisions, the District Provost Marshal will inspect the installations under actual night operating conditions and if they are approved, will so notify the Plans and Training Officer at District Headquarters. Following official approval, the applicant will receive

Exhibit N—(Continued)

from District Headquarters a certificate of authority to operate during blackout hours.

Applications will be considered only from businesses or industries engaged in production of essentials necessary for the war effort or otherwise connected with the National Defense Program.

3. Motor Vehicle Blackout.

3.01. All motor vehicles operating during the hours of blackout shall conform to the specifications as set forth in the following paragraphs.

3.02. Headlights. Two (2) approved blackout driving headlights shall be used on each motor vehicle, except on motorcycles and motor scooters, which shall have but one (1). Such lamps shall have the necessary color designs as described below, with a slot which emits white light for driving. This slot shall be covered by a metal hood. Except as shown in paragraphs 3.07 and 3.11 below, the mounting height of the headlights shall be not less than twenty-four (24) inches nor more than fifty-five (55) inches measured from road level to the bottom of the slot, and in no case higher than the top of the rim of the steering wheel. With the vehicle on level surface and carrying a capacity load, the unit shall be so adjusted that the bottom of the slot is horizontal and so aimed that the visual cut-off up the top of the beam on a vertical screen 10 feet in front of the lamp is at least four (4) inches below the bottom of the horizontal slot in the headlight and in no instances higher than fifty-one (51) inches from the road

Exhibit N—(Continued)

level. When mounted on motorcycles or motor scooters, the lamp shall be placed on the front as near the center as possible to normal line of operator's vision and far enough forward to eliminate any objectionable reflection of light from any portion of the vehicle.

The upper sector of the headlight shall be painted a deep red color of brightness of 3 and not to exceed 3.5 foot-lamberts (this light will be visible at a distance at one thousand (1,000) and not over one thousand five hundred (1,500) feet). The thickness of the red band at the center of the vertical axis shall be at least 1½ inches and not to exceed 2½ inches. Paint shall be sprayed on the lens instead of brushing, thus producing an even surface. The other portion of the headlight, with the exception of the white light slot, shall be painted black or lusterless olive drab.

White Light Slot. Except as shown in paragraphs 3.06 to 3.13 below, the white light slot for all motor vehicles shall be one-eighth (⅛) inch wide by two (2) inches long and placed at right angles to the vertical axis of the light. The bottom of the slot shall be located at the focal point of the lens which is about three-fourths (¾) inch below the center of the headlight bulb, but in no case shall it be more than one (1) inch below the center of the bulb.

Metal Shield or Hood Over Slot. The metal shield or hood over the white light slot shall be twenty (20) to twenty-eight (28) gauge sheet metal,

Exhibit N—(Continued)

extending from side to side of the headlamp and be tightly clamped to the outer rim of the headlamp. At the center of the vertical axis of light, the shield shall have an angle of from forty-five (45) to seventy (70) degrees from the vertical axis at the face of the lens, and sloped downward so that the outer edge of the shield will be at least 1¾ inches and not more than 2½ inches from the lens at the narrowest part of the shield. The outer edge of the shields shall be designed so that a lip protrudes to cover the white light slot, this lip to be one-fourth (¼) inch long, and to be of sufficient width to extend a minimum of one-half (½) inch over each end of the white light slot. The outer edge of the shield shall be folded back approximately three-eighths (⅜) inch to provide stiffness for the shield. The ends of the shield shall be closed and extended sufficiently back into the lamp to provide a clip to hold the shield in position on the headlamp. The inner face of the shield, or face on the lens side, shall be made to fit snugly to the curvature of the lens. Due to various types of headlights now in use on vehicles, the curvature of the shield shall be cut to fit each individual type of lens. The lip of the shield, when in proper position, and when the vehicle is fully loaded, shall give the adjustment prescribed in paragraph 3.02 supra. The shield shall be painted black or lusterless olive drab on the exterior and interior surfaces. Suitable mastic will be applied around the circumference of the lens at the junction of the glass with

Exhibit N—(Continued)

the retaining rim, and between the inner face of the shield and headlight lens, to properly shield any light at these points.

3.03. Combination Tail and Stop Lamp, Reflectors, and Additional Equipment. One tail, or combination tail and stop, lamp shall be securely mounted on the extreme rear of the vehicle and as near the left side as is practicable with red color as described below and aimed straight to the rear, so that it will be clearly visible to traffic approaching from the rear. Except as specified in paragraph 3.11 below, such lamps shall be mounted not less than twenty (20) inches and not more than fifty (50) inches above the road level. When mounted on motorcycles or motor scooters, this lamp shall be mounted on the rear fender. The tail light shall have a round circle one-half (½) inch in diameter of red color as prescribed for headlights in paragraph 3.02 above. The remainder of the lens shall be painted black or lusterless olive drab.

An additional tail, or combination tail and stop lamp as described hereinabove shall be securely mounted on the extreme rear of all motor vehicle combinations one hundred (100) inches and more in width as near the right side as is practicable, and at the same height and alignment as the left combination tail and stop lamp.

Two approved red reflectors may be mounted on all over-sized motor vehicles, as hereinabove de-

Exhibit N—(Continued)

scribed, on the extreme rear, and two approved amber reflectors may be mounted on the extreme front, on each side, as low on the vehicles as practicable and in no case higher than thirty (30) inches above the road level.

3.04. Instrument and Dashboard Lights, Interior, and Exterior Lights. Instrument and dashboard lights shall be extinguished unless illumination provided therefor is of low intensity and deep red in color. Except as shown in paragraph 3.08 below, all other interior lights in the vehicle shall be extinguished and rendered inoperative. All exterior lights not authorized by this General Orders shall be removed or rendered inoperative.

3.05. Testing of Lights. The intensity of brightness of red used on headlights and tail lights shall be tested by the brightness meter manufactured by the Weston Electric Company by the gauge designed and tested by the Department Engineer, by the Official Headlight Testing Stations operated by the U. S. Army Ordnance Department, or by other methods when approved by the Office of the Military Governor. The size and location of the white light slot, relative to the lip on the metal shield, shall be tested by a suitable screen to insure that the headlights conform with specifications set forth herein (if the vehicle is tested with less than capacity load, suitable allowances will be made to insure that the adjustment will meet these specifications when vehicle is loaded to capacity). This adjustment will be made by moving the entire

Exhibit N—(Continued)

headlamp. The shield will not be bent unless it is impossible to make this adjustment otherwise.

3.06. Lights for Special Vehicles. Such Vehicles as are described in paragraphs 3.07 to 3.13 below are hereby authorized to have the lights provided for in said paragraphs of this General Orders.

3.07. Trucks of Over 3-Ton Rated Capacity. All lights for trucks of over 3-ton rated capacity will conform to specifications set forth herein, except that the white light slot of the headlights may be increased to three-eighths (3/8) inch wide by three (3) inches long.

Vehicles in this category may have lights mounted at a height in excess of fifty-five (55) inches measured from the bottom of the slot to road level provided that visual cut-off up the top of the beam on a vertical screen ten (10) feet in front of the lamp is at least four (4) inches below the bottom of the horizontal slot and in no case higher than fifty-three (53) inches from road level when vehicle is carrying a capacity load.

3.08. Busses. All lights for busses will conform to specifications set forth herein except that the white light slot of the headlights may be increased to three-eighths (3/8) inch wide by three (3) inches long.

The route markers on all busses will be illuminated with a red light of low intensity.

A maximum of ten (10) interior dome lights of low intensity may be used in each bus.

Exhibit N—(Continued)

the circumference of the spotlight and be at least two (2) inches longer than the diameter of the lens of the spotlight.

3.12. Police Cars. All lights of police cars will conform strictly with specifications set forth herein, except that the white light slot of the headlights may be one-fourth (¼) inch wide by two (2) inches long.

Police cars may be equipped with a hooded white spotlight, which may be used during peaceful times when responding to emergency calls or in other emergency situations. In case of a blitz or other emergency no spotlights will be used. The hood will encircle the circumference of the spotlight and be two (2) inches longer than the diameter of the lens of the spotlight.

3.13. Road Sweepers. All lights on road sweepers will conform strictly with specifications set forth herein, except that the white light slot of the headlights may be one-fourth (¼) inch wide by three (3) inches long.

Road sweepers may be equipped with a hooded spotlight of low power for the purpose of defining the curb line of the road. In case of a blitz or other emergency situation, no spotlight will be used. The hood will encircle the circumference of the spotlight and be two (2) inches longer than the diameter of the lens of the spotlight.

3.14. Any shop, paint shop, or garage which is equipped to paint and install shields and test headlights, so that they meet specifications set forth

Exhibit N—(Continued)

herein, are authorized to perform this work. These shops may be inspected regularly by the Department Ordnance Officer, headquarters Hawaiian Department, or his duly authorized representative.

3.15. Upon installation, painting or testing of motor vehicle blackout lights, the shop performing the work will affix a gum sticker to the inside lower right corner of the windshield. The sticker will be not more than one (1) inch wide by 2½ inches long. The face of this sticker will show that the lights have been tested and adjusted. The reverse of the sticker will be filled in to indicate the date, organization, and name of the individual performing the adjustment and test.

3.16. No shop, paint shop, or garage shall install shields or paint headlights without performing the proper test and adjustment to meet specifications set forth herein, nor shall any person tamper with the lens or shields of headlights after they have been inspected and approved.

4. Traffic During Hours of Blackout.

4.01. Enemy Aliens. No enemy alien shall be present on the streets and highways, in parks, and on beaches, either on foot or in vehicles, during the hours of blackout.

4.02. Persons Other Than Enemy Aliens. Except as is hereinafter authorized, no person shall be present on the streets and highways, in parks, and on beaches either on foot or in vehicles, during the hours of blackout after 10:00 P. M.

Exhibit N—(Continued)

4.03. Certain Persons Permitted Out-of-Doors After 10:00 P. M. The following classes of persons are excepted from the restrictions of paragraph 4.02 above:

Personnel of the Armed Forces of the United States and allied nations on duty or proceeding to and from duty;

Law enforcement officers on duty or proceeding to and from duty;

Civilian personnel required to be on the streets and highways during such hours because of their employment on defense work, by public utilities, in civilian defense activities, or by the government, or while proceeding directly to and from work;

Doctors on call;

Persons holding Police passes issued since December 7, 1941;

Persons holding special passes issued and approved by the Provost Marshal, Military Police, or Civilian Police; and

Enemy aliens transported in motor vehicles during the hours of blackout by drivers of non-enemy ancestry upon written approval of the Provost Marshal.

4.04. Vehicular and Passenger Traffic During Blackout. Any person except an enemy alien may drive, or ride as a passenger in, a motor vehicle on the streets and highways during blackout hours from the commencement of the period thereof until ten o'clock P. M., but not thereafter during said blackout hours unless duly authorized pursuant

Exhibit N—(Continued)

to the General Orders of the Military Governor. Motor vehicles driven pursuant to this paragraph 4.04 during blackout hours shall conform with all other blackout regulations wtih respect to equipment and manner of operation of such motor vehicles.

4.05. Twenty Miles Speed Limit. Except as authorized by the civil or military police, no person shall operate any vehicle at a rate of speed in excess of twenty (20) miles per hour during hours of blackout.

4.06. No Parking. No person shall park any vehicle on any public thoroughfare, street, or highway, during the hours of blackout.

4.07. Removal of Keys From, and Locking Ignition of, Parked Cars. No person shall allow the keys of any motor vehicle, of which he is the owner of operator, to remain therein, during the hours of blackout, while such vehicle remains properly and lawfully unattended; nor shall any person leave any motor vehicle, of which he is the owner or operator, during the hours of blackout, without first having locked the ignition thereof if possible.

Nothing contained in paragraph 4.07 shall be construed to relieve any person of the restriction imposed by paragraph 4.06 hereof.

4.08. Taxicabs Allowed on Streets After 5:30 A. M. All taxicabs, except those owned or operated by enemy aliens, are authoribed to be operated and to be on the streets and highways of the Territory of Hawaii after 5:30 A. M. daily.

Exhibit N—(Continued)

4.09. No person shall, during the hours of blackout, violate any statute of the Territory of Hawaii, or any ordinance, resolution, by-law, regulation, or rule of any city, city and county, county, or other municipal corporation or political subdivision of the Territory of Hawaii, regulating or relating to traffic, now in force or hereinafter in force; and all such traffic violations or offenses occurring during the hours of blackout hereby are made violations or offenses of and punishable under the General Orders of the Military Governor.

5. Workers Going to Work in the Morning.

5.01. Men and women who must leave their homes before the termination of the hours of blackout in order to reach their places of employment between the hours of 7:00 and 8:00 A. M., respectively, are permitted to proceed on the streets and highways of the Territory of Hawaii in motor vehicles or on foot after 5:30 A. M. Such workers shall leave their homes as late as possible.

5.02. Between the hours of 5:30 A. M. and the termination of the hours of blackout, all blackout rules and regulations of the Military Governor shall be observed. Motor vehicles shall proceed with all caution necessary with safety, and shall comply with the maximum speed limit as prescribed by this General Orders.

5.03. No enemy alien shall be present on the streets or highways between the hours of 5:30 A. M. and the termination of the hours of blackout, unless special permission of the Provost Marshal or

Exhibit N—(Continued)

his duly authorized representative has first been secured.

5.04. Nothing contained in this Title 5 shall be construed to permit the use of light or other means of illumination during hours of blackout, except in compliance with all blackout rules and regulations of the Military Governor.

5.05. Children under the age of 16 years will not be permitted on the streets and highways between the hours of 5:30 A. M. and the termination of the hours of blackout, unless accompanied by one of their parents or some other adult person, and unless their travel is directly connected with their parents or guardians proceeding to work.

6. Personal Identification During Hours of Blackout.

6.01. All persons required to be on the streets and highways during the hours of blackout after 10:00 P. M. shall carry an identification badge, pass, or letter from their employer evidencing their right to be on the streets, and any such person who may be stopped by the civil or military police during said hours of blackout shall identify himself promptly.

7. Places of Amusement and Business.

7.01. All persons, firms, and corporations who operate and maintain places of business and amusement shall comply with all the blackout rules and regulations of the Military Governor during that period of the hours of blackout that the said places

Exhibit N—(Continued)

of business and amusement remain open and are operated.

8. Enforcement.

8.01. Enforcement by Provost Marshal. The Provost Marshal, Hawaiian Department, shall have the power to control the sufficiency and effectiveness of the blackout and shall enforce all rules, regulations, and General Orders of the Military Governor relating to, or pertaining to, blackout in the Territory of Hawaii.

8.02. Penalty for Violations. Any person, firm or corporation, who violates, refuses, fails, or neglects to comply with any of the provisions of this General Orders, or who evades or attempts to evade any of the provisions of this General Orders, upon conviction thereof, shall be punished by confinement, with or without hard labor, not to exceed one (1) year, or by a fine not to exceed one thousand dollars ($1,000.00), or by both such confinement and fine.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A. U. S.
Executive

—

10 March 1943

GENERAL ORDERS NO. 4
Air Raid

1. Air Raid Alarm System.
2. Vehicular Traffic During Air Raid.
3. Pedestrian Traffic During Air Raid.

Exhibit N—(Continued)

4. White Fenders and Red Spot Lights.
5. Places of Public Gathering.
6. Duties and Responsibilities of Air Raid Wardens.
7. Penalty for Violations.

1. Air Raid Alarm System.

1.01. The Department Signal Officer, Headquarters Hawaiian Department, Fort Shafter, T. H., shall have the exclusive control of, and supervision over, the installation, maintenance, and operation of the air raid alarm system established for the Territory of Hawaii.

1.02. No person, other than the Department Signal Officer, or his duly authorized representative or agent, shall operate, tamper with, damage, or in any manner interfere with the operation of, the air raid alarm system established for the Territory of Hawaii.

2. Vehicular Traffic During Air Raid.

2.01. Official Vehicles. When an air raid alarm is sounded, all official vehicles will continue on their missions and will conform to the prescribed speed and traffic regulations.

2.02. Non-official Vehicles. When an air raid alarm is sounded, drivers of non-official vehicles will be governed by the regulations in the following paragraphs, which will permit the movement of such vehicles to their destinations:

If the road is clear, drive to destination but not to an airfield, the waterfront, a military or naval

Exhibit N—(Continued)

installation, or to the business district. Do not exceed the prescribed speed limits at any point.

Give the right of way immediately to all official vehicles, civilian or military.

If forced to stop, do Not jam up close to the vehicle ahead. Pull well to the right and Clear the road.

Do Not "block" a street or road intersection.

Do Not park on streets which have been designated as "No Parking" streets.

Obey all orders of the military and civilian police.

In air raid alarms during blackout hours the standard blackout headlights and tail-lights will be turned on while vehicles are in operation.

2.03. Definitions. For the purposes of this General Orders, "official vehicles" shall be defined to mean, and shall include, Army, Navy, Police Department, Fire Department, Medical Services, Civilian Defense Authorities, and Press vehicles, vehicles driven by operating and repair personnel for public utilities, and vehicles operated by members of the Armed Forces proceeding on their missions. All other vehicles are classified "non-official vehicles."

3. Pedestrian Traffic During Air Raid.

3.01. At the time of sounding of an air raid alarm all pedestrians shall seek shelter in available air raid shelters, or shall disperse to their homes, following the instructions of civil and military police. Under no circumstances shall pedestrians, other than those on official duty, proceed to the waterfront or the business district.

Exhibit N—(Continued)

4. White Fenders and Red Spot Lights.

4.01. In order to facilitate the movement of motor vehicles of public utilities, the Police Department and Fire Department, and ambulances, on the streets and highways of the Territory of Hawaii during air raids, air raid alarms, attack, invasion, or other emergencies, the lower twelve (12) inches of the left front fender of each vehicle authorized by the Military Governor or his District Representative may be painted white not to exceed a width of twelve (12) inches. Fenders painted white shall be painted on the front and the white part shall not extend to the side or top thereof for a distance greater than two (2) inches.

4.02. Ambulances and bomb disposal vehicles authorized by the Military Governor or his District Representative may be equipped with a red spot light mounted on top of the vehicle in the center near the forward edge of the top. The spot light will be shielded with a cylindrical shield which shall extend two inches beyond the face of the lens. This light will only be used when such vehicles are moving on emergency calls.

4.03. All agencies identifying their motor vehicles pursuant to paragraphs 4.01 and 4.02 above shall submit a list of such motor vehicles to the Office of the Military Governor on the Island of Oahu or the Representative of the Military Governor in other districts.

4.04. No person, firm, or corporation other than those authorized shall use the identification de-

Exhibit N—(Continued)

scribed in paragraphs 4.01 and 4.02 hereof, nor shall the provisions of this Title 4 be construed in such a manner as to include motor vehicles owned by officials or employees of said public utilities or departments.

5. Places of Public Gathering.

5.01. At the time of sounding of an air raid alarm, all persons present in theatres, auditoriums, or other places of public gathering shall vacate such places and disperse to their homes, public air raid shelters, or other shelters, pursuant to regulations prescribed in this General Orders.

6. Duties and Responsibilities of Air Raid Wardens.

6.01. The duties and responsibilities of Air Raid Wardens shall be as set forth in the following paragraphs.

6.02. Wardens are given the right to patrol the area to which they are assigned at all times. In patrolling the area (except as hereinafter provided) the warden is limited in authority to the area bounded by public vehicular streets.

6.03. Wardens may enter upon private property at any and all times for the purpose of investigating the conditions or any other conditions incidental to the proper protection of the area to which they are assigned. All such investigations shall be made with the consent of the owners or occupants of the property if possible, but if they refuse to give their consent or are absent from the premises the air raid warden may, when it is reasonably necessary to do

Exhibit N—(Continued)

so, enter thereon for the purposes hereinabove set forth; provided, however, that when any entry is made upon the premises of another without the consent of the owner or occupant thereof, such entry shall be limited to the grounds of such premises and no dwelling or other building shall be entered without such consent.

6.04. In time of acute emergency or raids, wardens shall advise the public of any areas which they may from time to time determine to be of danger to the public, until such time as proper military or police officials can be notified of the existence of such areas or dangers, and control over them can be assumed by such police or military authorities.

6.05. In the event of an attack wardens are empowered to direct all civilian pedestrians not engaged in defense activity from the streets to places of shelter.

6.06. Wardens are empowered to request the abatement of any fire hazard or condition which would contribute to the danger of the area to which they are assigned, and if such request is not complied with within a reasonable time, they shall report same to the proper authorities for such action as shall be deemed necessary by such authorities.

6.07. Wardens shall have the power, without fear of civil liability, to report any and all acts, conditions or circumstances which appear to them to be inimical to the public good.

6.08. None of the police powers relative to arrest,

Exhibit N—(Continued)

the use of force or the directing of vehicular traffic shall be exercised by a warden.

6.09. Wardens are permitted to be on the streets at any hour when their presence thereon is required to carry out their duties as wardens, giving due consideration to the area to which they are assigned and the necessities of their traveling upon the highways.

6.10. Wardens shall assist persons within their jurisdiction to obtain necessary and available requirements for proper protection which may from time to time be distributed to the public.

6.11. Nothing herein contained shall be deemed to give wardens any privileges not accorded other civilian population save and except those required in the conduct and execution of their duties and responsibilities hereinabove defined.

6.12. The duties and responsibilities hereinabove defined refer only to those activities relating to protection and defense against attacks.

6.13. The term "warden" where used herein shall include all members of the Air Raid Warden Division of the Office of Civilian Defense.

7. Penalty for Violations.

7.01. Any person, firm, or corporation who or which violates, or attempts to violate, or evades or attempts to evade, any of the provisions of this General Orders, upon conviction thereof, shall be punished by confinement, with or without hard labor, for a period not to exceed six (6) months, or

Exhibit N—(Continued)

by fine not to exceed five hundred dollars ($500.00), or by both such confinement and fine.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

10 March 1943

GENERAL ORDERS NO. 5
Civilian Security

1. Evacuation Warning Order.
2. Businessmen's Military Training Corps.
3. Gas Alarms.
4. Penalty for Violations.

1. Evacuation Warning Order.

1.01. This order is issued to further the defense of the Territory of Hawaii, promote internal security, eliminate interference with troop movements and with defense maneuvers, and save civilian lives. This order will be effective forthwith upon order or call of the Military Governor in the event an emergency shall arise requiring the evacuation of the civilian population from the areas of greatest danger.

1.02. Honolulu Urban Area. The Honolulu Urban Area hereby is designated as an evacuation area on the Island of Oahu, Territory of Hawaii, and shall be that area of the City and County of Honolulu makai of and bounded by Middle Street

Exhibit N—(Continued)

from Kamehameha Highway to King Street; along same to Houghtailing Street; along same to Vineyard Street; along same to Liliha Street; along same to School Street; along same to Lusitana Street; along same to Auwaiolimu Street; along same to Pensacola Street; along same to Wilder Avenue; along same to Punahou Street; along same to Beretania Street; along same to Waialae Avenue; along same to Kapahulu Road; along same to Campbell Avenue; along same to Hayden Street; along same to Eleventh Avenue; along same to Kaimuki Avenue; along same (through Kaimuki Crater) to Twenty-Second Avenue; thence on a direct line to and along Amau Place to Oili Road; thence on a direct line through the intersection of Kealaolu Avenue and Farmers Road to Kapakahi Stream; thence along same to the sea.

1.03. Rural Oahu and Outside Islands. In rural Oahu and in the outside Islands, the evacuation areas shall be such areas as will be designated by the Evacuation Divisions of the Office of Civilian Defense, Oahu Sector Commanders and the District Commanders concerned.

1.04. All women and girls and children under the age of 15 years residing within the evacuation areas hereinbefore described and referred to should prepare to evacuate from said areas and be familiar with and ready to follow the instructions and plans of the Office of Civilian Defense concerning such evacuation. All men not otherwise engaged in essential work shall remain in such area where they

Exhibit N—(Continued)

reside or maintain their business establishments to guard against fires, and provide for protection of property. Women and girls employed in essential defense work shall remain at their posts.

1.05. All movement of traffic will be as directed by Military and Civil Police and designated civilian defense personnel under the control of the Provost Marshal.

1.06. The foregoing shall not apply in the event of air raid alarms, but only in cases of extreme emergency, upon further order of the Military Governor, of which notice will be clearly given.

2. Businessmen's Military Training Corps.

2.01. The duties and responsibilities of the Businessmen's Military Training Corps shall be as provided in the following paragraphs.

2.02. The Businessmen's Military Training Corps is a voluntary, self-governing body of citizens on the Island of Oahu, Territory of Hawaii, whose purpose is to assist the Provost Marshal in the execution of his duties whenever called upon to do so and to be ready for any service required when called upon by the Military Governor, as a trained adjunct to the military forces in times of grave emergency.

2.03. All necessary preparation and training of the Corps shall be planned and supervised by the officers of the Businessmen's Military Training Corps. The Provost Marshal, Hawaiian Department, is hereby designated as the military advisor to the Corps and will assist in its training. The

Exhibit N—(Continued)

law enforcement agencies under the Provost Marshal will likewise render such assistance as is practicable in the training of the Corps.

2.04. To the extent that it is practicable, arms, ammunition, and other equipment will be furnished by the Army. Appropriate instruction in the employment and care of such arms, ammunition, and equipment will also be supplied by the Army.

2.05. The Businessmen's Military Training Corps is authorized to wear khaki uniforms to which may be affixed the authorized shoulder patch. The insignia of officers, non-commissioned officers and members of the Corps shall be as designated by the Military Governor.

2.06. The Businessmen's Military Training Corps will not in any way assume the duties now assigned to the Military Police, the Civil Police, or to other law enforcement agencies or to Wardens, except when acting as an adjunct to the military forces of the United States in time of grave emergency, or when specifically assigned to law enforcement duty by the Provost Marshal.

3. Gas Alarms.

3.01. Gas alarms, to be given when an enemy gas attack occurs, hereby are divided into two classes: General and Local.

A General alarm shall be given only in the case of a cloud gas attack which is expected to involve a large area. Notice of a General alarm will be issued by all normal methods of communication, and

Exhibit N—(Continued)

will be directed to all localities which may be affected.

A Local alarm shall be given in the event the presence of gas is recognized in any place or area. Notice of a Local alarm shall be imparted by means of percussion sounds; such as those produced by bells, triangles, iron rails, and empty cartridge cases struck rapidly and continuously.

3.02. When a gas alarm is given all persons in the area will immediately wear the gas masks issued to them, taking care to carefully adjust them, and then proceed out of the affected area, seeking higher levels, as gas normally finds the lower level. If in an air raid shelter or dugout, all persons shall, immediately after putting on the masks, leave for higher ground. If in a building, all persons shall go to the top floors thereof. The mask shall not be removed until it is certain that gas no longer exists in the area, as even a very small amount is dangerous.

The gas mask will protect the eyes and respiratory tract of the wearer from all chemical agents which will be encountered.

3.03. Signals for sounding gas alarms have been placed throughout the Territory of Hawaii and marked to indicate their use. No person shall sound any such signal at any time, for any purpose, excepting only members of the Police Department, Air Raid Wardens, Businessmen's Training Corps, Hawaiian Territorial Reserve Guard, Teacher Gas

Exhibit N—(Continued)

Sentries, and members of the armed forces or other persons specifically authorized to do so.

4. Penalty for Violations.

4.01. Any person who violates or evades, or attempts to violate or evade, any of the provisions of this General Orders, upon conviction thereof, shall be punished by confinement, with or without hard labor, for a period not to exceed six (6) months, or by a fine not to exceed Five Hundred Dollars ($500.00), or by both such confinement and fine.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

10 March 1943

GENERAL ORDERS NO. 6

Aliens

1. Definition of "Enemy Alien" and "Alien Enemy."
2. Policy towards Enemy Aliens.
3. Regulation of Conduct of Enemy Aliens.

1. Definition of "Enemy Alien" and "Alien Enemy."

1.01. The term "enemy alien" or "alien enemy," as used in this General Orders or in any other General Orders of the Military Governor, unless the use thereof in such General Orders clearly indicates otherwise, shall include, and hereby is de-

Exhibit N—(Continued)

fined to mean, all natives, citizens, denizens, or subjects of Japan, Germany Italy, Bulgaria, Hungary, Rumania, or of any other nation or government hostile to the United States, who are within the Territory of Hawaii.

2. Policy Towards Enemy Aliens.

2.01. All enemy aliens hereby are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and Territory of Hawaii, and to refrain from actual hostility or giving information, aid, or comfort to the enemies of the United States, and to comply strictly with the regulations which hereby are, or may be, from time to time promulgated by the President of the United States or the Military Governor of the Territory of Hawaii; and so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States. All citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.

2.02. Enemy aliens hereby are permitted to go about their business and visit friends and relatives throughout the day without special permits or

Exhibit N—(Continued)

passes except during the hours of blackout and as may be otherwise limited by this General Orders or special regulations.

2.03. All enemy aliens who fail to conduct themselves as so enjoined, in addition to being liable to restraint, shall be subject to all other penalties prescribed by law and these General Orders.

3. Regulation of Conduct of Enemy Aliens.

3.01. All enemy aliens within the Territory of Hawaii shall comply strictly with the regulations as set forth in the following paragraphs.

3.02. No enemy alien shall commit, aid, or abet any hostile act against the United States, or give information, aid, or comfort to its enemies.

3.03. No enemy alien within the Territory of Hawaii shall write, print, publish, utter, or otherwise make any attack or threats against the Government or Congress of the United States, or any branch thereof, or against the measures or policy of the United States, or against the person or property of any person in the military, naval, or civil service of the United States or of the Territory of Hawaii.

3.04. All enemy aliens shall carry on their person the alien registration card or certificate issued to them at the time of their registration under Section III of the Act of June 28, 1940.

3.05. No enemy alien shall change his place of residence or occupation within the Territory of Hawaii without first having obtained the approval of the Provost Marshal therefor. This requirement

Exhibit N—(Continued)

does not eliminate the necessity of complying with the provisions of Section 35 of the Act of June 28, 1940 (54 Stat. 675).

3.06. No enemy alien shall undertake an air flight or ascend into the air in any aircraft, balloon, or flying machine of any sort, whether owned governmentally, commercially, or privately, except upon written authority of the Contact Office, Office of the Assistant Chief of Staff, G-2, Headquarters Hawaiian Department.

3.07. No enemy alien shall have in his actual or constructive possession at any time or place, or use or operate, any of the following listed articles:

Firearms;

Weapons or implements of war or component parts thereof;

Ammunition;

Bombs;

Explosives or material used in the manufacture of explosives;

Short-wave radio receiving sets;

Transmitting sets;

Signal devices;

Codes or ciphers;

Cameras;

Materials and supplies used for the developing and printing of photograps;

Paper, documents or books in which there may be invisible writing; photographs, sketches, pictures, drawings, maps or graphical repre-

Exhibit N—(Continued)

sentations of any military or naval installations or equipment, of any arms, ammunition, implements of war; or devices or things used or intended to be used in the combat equipment of the land or naval forces of the United States, or of any military or naval post, camp or station;

Binoculars, field glasses, telescopes, or any other device used or designed for use for making observations at distances.

Any enemy alien having in his possession or under his control any article listed above will forthwith report the possession of such article to the nearest police station where he will receive instructions for the disposition thereof. Dealers, handlers, and brokers having quantities of such articles will submit a complete inventory thereof to such police station where they will receive instructions for the disposition thereof.

3.08. Any article of the classes of property listed above found in the possession of an enemy alien shall be subject to seizure and the possessor shall be subject to trial and punishment.

3.09. Any enemy alien who desires to travel between any of the districts designated by the Office of Civilian Defense on the Island of Kauai, Kauai District, will obtain a pass from the Regional Directors, Office of Civilian Defense, prior to such travel.

Exhibit N—(Continued)

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

—

10 March 1943

GENERAL ORDERS NO. 7

Military Areas

1. Purpose.
2. Executive Order No. 9066 of the President of the United States.
3. Hawaiian Department Prescribed as Military Area Pursuant to Executive Order No. 9066.
4. Honolulu Defensive Sea Area.
5. Hawaiian Maritime Control Area.
6. West Loch Area,
7. Iwilei Area.
8. Waterfront Area.
9. Protection of Waterfront Property.
10. Emergency Waterfront Charge.
11. Security Regulations for Vessels in Port.
12. Kokee Restricted Area, Kauai District.
13. Pali Road Restricted Area.
14. Penalty for Violations.

1. Purpose.

1.01. This General Orders is issued in the interests of internal security as additional protection against possible espionage and sabotage.

Exhibit N—(Continued)

2. Executive Order No. 9066 of the President of the United States.

2.01. The following Executive Order, being Executive Order No. 9066 of the President of the United States, dated February 19, 1942, is published for the information and guidance of all concerned:

Executive Order

Authorizing the Secretary of War to Prescribed Military Areas

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104):

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be

Exhibit N—(Continued).

subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing

Exhibit N—(Continued)

of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

FRANKLIN D. ROOSEVELT

The White House
February 19, 1942.

3. Hawaiian Department Prescribed as Military Area Pursuant to Executive Order No. 9066.

3.01. All concerned hereby are notified that Delos C. Emmons, Lieutenant General, United States Army, by virtue of the authority vested in him by the President of the United States and by the Secretary of War, and by his powers and prerogatives as the Commanding General, Hawaiian Department, and as the Military Governor of the Territory of Hawaii, and as a Military Commander

Exhibit N—(Continued)

under Executive Order No. 9066 of the President of the United States, dated February 19, 1942, deeming it necessary to do so, pursuant to an order dated October 16, 1942, did declare, designate, establish, and prescribe the Hawaiian Department, to wit:

All the islands belonging to the United States within the area between one hundred fifty (150) degrees west longitude and one hundred sixty (160) degrees east longitude, and between fifteen (15) degrees south latitude and thirty (30) degrees north latitude, a military area within the meaning of said Executive Order No. 9066.

4. Honolulu Defensive Sea Area.

4.01. The following Executive Order (No. 8987) is published for the information and guidance of all concerned:

Executive Order

Establishing Honolulu Defensive Sea Area

By virtue of the authority vested in me by section 44 of the Criminal Code as amended (U.S.C. Title 18, Sec. 96), the following-described area is hereby established and reserved, for purposes of national defense, as a naval defensive sea area, to be known as "Honolulu Defensive Sea Area";

All United States territorial waters of Honolulu Harbor, Oahu, Territory of Hawaii, its approaches and tributaries from the contour line of extreme high water as shown on the latest U.S.C. and G.S. charts to:

A line running south true from the shore at Koko Head, Oahu, along the meridian of Longitude 157°

Exhibit N—(Continued)

42 West, to the seaward limit of United States territorial waters;

A line running south true from Ahua Point Lighthouse to the seaward limit of United States territorial waters; and

A line running along the seaward limit of the United States territorial waters between the above-described bearing lines.

A vessel not proceeding under United States Naval or other United States authorized supervision shall not enter or navigate the waters of the Honolulu Defensive Sea Area except during daylight, when good visibility conditions prevail, and then only after specific permission has been obtained. Advance arrangements for entry into or navigation through or within the Honolulu Defensive Sea Area must be made, preferably at a United States Naval District Headquarters in advance of sailing, or by radio or visual communication on approaching the seaward limit of the area. If radio telegraph is used, the call NQO shall be made on a frequency of 500 kcs, and permission to enter the port shall be requested. The name of the vessel, purpose of entry, and name of the master must be given in the request. If visual communications are used, the procedure shall be essentially the same.

A vessel entering or navigating the waters of the Honolulu Defensive Sea Area does so at its own risk.

Even though permission has been obtained, it is incumbent upon a vessel entering the Honolulu De-

Exhibit N—(Continued)

fensive Sea Area to obey any further instructions received from the United States Navy, or other United States authority.

A vessel may expect supervision of its movements within the Honolulu Defensive Sea Area, either through surface craft or aircraft. Such controlling surface craft or aircraft will be identified by a prominent display of the Union Jack. The loading or unloading by vessels of oil fuel or other inflammable or explosive materials shall be under the control of the local Naval authority, who shall require such loading or unloading to be accomplished in such manner and at such times as will safeguard the other activities within the Honolulu Defensive Sea Area essential to the national defense.

These regulations are subject to amplification by the local United States Naval authority as necessary to meet local circumstances and conditions.

When a United States Maritime Control Area is established adjacent to or abutting upon the above-established adjacent defensive sea area, it shall be assumed that permission to enter, and other instructions issued by proper authority, shall apply to any one continuous passage through or within both areas.

Any master of a vessel or other person within the Honolulu Defensive Sea Area who disregards these regulations, or fails to obey an order of United States Naval authority to stop or heave to, or performs any act threatening the efficiency of mines or

Exhibit N—(Continued)

other defenses or the safety of navigation, or takes any action inimical to the interests of the United States, may be detained therein by force of arms, and shall be liable to attack by United States armed forces, and liable to prosecution as provided for in section 44 of the Criminal Code as amended (U.S.C., title 18, sec. 96).

All United States Government authorities shall place at the disposal of the Naval authorities their facilities for aiding in the enforcement of these regulations. The Governor of the Territory of Hawaii; the local municipal authorities, and the local civilian defense agencies are called upon to render the local Naval authorities all possible assistance in the enforcement of these regulations.

This order shall not be construed as modifying in any way the proclamation of the Governor of the Territory of Hawaii placing the Territory of Hawaii under martial law.

The Secretary of the Navy is charged with the publication and enforcement of these regulations.

FRANKLIN D. ROOSEVELT

The White House
December 20, 1941.

5. Hawaiian Maritime Control Area.

5.01 The following proclamation is published for the information and guidance of all concerned:

Exhibit N—(Continued)

By the President of the United States of America

A Proclamation

Whereas the United States is now at war, and the establishment of the maritime control area hereinafter described is necessary in the interests of national defense;

Now, Therefore, I, Franklin D. Roosevelt, President of the United States of America, by virtue of the authority vested in me as President of the United States, and as Commander-in-Chief of the Army and Navy of the United States, and in accordance with the principle of self-defense of the Law of Nations, do hereby proclaim and establish the following-described area as the Hawaiian Maritime Control Area, and prescribe the following regulations for the control thereof:

Hawaiian Maritime Control Area

All waters contained within the area delimited by lines connecting successively the following points:

Latitude 22° 31′ N.	Longitude 158° W.
Latitude 21° N.	Longitude 155° 30′ W.
Latitude 20° 30′ N.	Longitude 155° 30′ W.
Latitude 20° N.	Longitude 156° 30′ W.
Latitude 21° N.	Longitude 159° W.
Latitude 22° N.	Longitude 159° W.
Latitude 22° 30′ N.	Longitude 156° W.

Exhibit N—(Continued)

Regulations for the Control of Hawaiian Maritime Control Area

1. A vessel not proceeding under United States Naval or other United States authorized supervision shall not enter or navigate the waters of the Hawaiian Maritime Control Area except during daylight, when good visibility conditions prevail, and then only after specific permission has been obtained. Advance arrangements for entry into or navigation through or within the said Area must be made, preferably by application at a United States Naval District Headquarters in advance of sailing, or by radio or visual communication on approaching the seaward limits of the area. If radio telegraphy is used, the call "NQO" shall be made on a frequency of 500 kcs, and permission to enter the port requested. The name of the vessel, purpose of entry, and name of master must be given in the request. If visual communications are used, the procedure shall be essentially the same.

2. Even though permission has been obtained, it is incumbent upon a vessel entering the said Area to obey any further instructions received from the United States Navy, or other United States authority.

3. A vessel may expect supervision of its movements within the said Area, either through surface craft or aircraft. Such controlling surface craft and aircraft shall be identified by a prominent display of the Union Jack.

Exhibit N—(Continued)

4. These regulations may be supplemented by regulations of the local United States naval authority as necessary to meet local circumstances and conditions.

5. Should any vessel or person within the said area disregard these regulations or regulations issued pursuant hereto, or fail to obey an order of the United States naval authority, or perform any act threatening the efficiency of mine or other defenses, or take any action therein inimical to the defense of the United States, such vessel or person may be subjected to the force necessary to require compliance, and may be liable to detention or arrest, or penalties or forfeiture, in accordance with law, the law applicable to violations committed on the high seas being international law.

The Secretary of the Navy is charged with enforcement of these regulations.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington, this 27th day of December in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one hundred and sixty-sixth.

[Seal] /s/ FRANKLIN D. ROOSEVELT

By the President:

/s/ CORDELL HULL

Secretary of State.

Exhibit N—(Continued)

6. West Loch Area.

6.01. There is hereby created and established in the interests of military necessity and public safety, a restricted military area, consisting of the general area adjacent to and immediately west of West Loch, Pearl Harbor, Island of Oahu, Territory of Hawaii, in accordance with boundary lines as now established and determined. Said area shall be evacuated of all persons except those to whom passes to return have been issued. Such evacuation shall be conducted under the supervision of the Provost Marshal, Hawaiian Department.

7. Iwilei Area.

7.01. There is hereby created and established, in the interests of military necessity and public safety, a restricted military area on the Island of Oahu, consisting of the Iwilei Area, bounded as follows:

Kapalama Drainage Canal from Kapalama Basin to Dillingham Boulevard; thence along the south side of Dillingham Boulevard to a point about 200 feet west of King Street; thence along the easterly (mauka) boundary of that portion of Oahu Railway and Land Company land which is used for railway yards, shops, offices, and station to a point on King Street about 320 feet north of Iwilei Road; thence along King Street to Iwilei Road; thence along the north side of Iwilei Road to Queen Street; thence along the west side of Queen Street to Pier 15, inclusive; thence along the harbor line in a westerly direction to the channel connecting Honolulu Harbor with Kapalama Basin; thence along said channel

Exhibit N—(Continued)

to Kapalama Basin; thence along the easterly boundary to Kapalama Basin to the Kapalama Drainage Canal.

Said area shall be evacuated of all persons except those to whom passes to return have been issued. Such evacuation shall be conducted under the supervision of the Provost Marshal, Hawaiian Department.

8. Waterfront Area.

8.01. There is hereby created and established, in the interests of military necessity and public safety, a restricted military area, consisting of the waterfront area of the City and County of Honolulu, Territory of Hawaii, described as follows:

The waterfront area of Honolulu makai of the following Described Line: Commencing at the ewa mauka corner of Ala Moana and South Streets; thence ewa on Ala Moana Street to an iron fence on the ewa side of premises occupied by the Contractors, Pacific Naval Air Bases; thence along said fence to the makai side of Punchbowl Street; thence to the makai side of Halekauwila Street; thence ewa on Halekauwila Street to the ewa side of Fort Street; thence mauka on Fort Street to the makai side of North Queen Street; thence along Queen Street to the waikiki side of Awa Street; thence along Awa Street to the mauka end of Pier 18; thence makai along ewa side of Pier 18 to Pier 19; thence ewa along mauka side of buildings of Pier 19 and across railroad spur to a point

Exhibit N—(Continued)

ten (10) feet ewa of said railroad spur; thence mauka parallel to railroad spur to makai side of pavement; thence ewa along pavement to Pier 24; thence mauka in front of Oahu Railway and Land Company to Pacific Street; thence along the makai side of Pacific Street; thence mauka across Pacific Street to Honolulu Gas Company, Ltd.; thence around the Honolulu Gas Company, Ltd.'s property; thence along the ewa side of Union Oil Company of California's plant to Hart Road; thence ewa on mauka side of Hart Road to the Kapalama Drainage Canal.

8.02. Entry into the above Restricted Area shall be limited to those individuals and vehicles properly identified and employed therein or on business pertaining to the United States, Territorial and Municipal governments, and to properly identified passengers of Inter-Island and Trans-Pacific ships. All persons regularly required to enter this area shall be furnished with a C. I. B. photographic badge and the Provost Marshal Waterfront pass or other photographic badge or pass approved by the Military Governor.

8.03. No person shall enter, be in, or remain in, said Waterfront Area or any part or portion thereof unless duly authorized to do so by the Military Governor of the Territory of Hawaii, his duly authorized agents or representatives, or by other competent authority.

Exhibit N—(Continued)

8.04. The employment of enemy aliens in the Restricted Area will be permitted only under conditions prescribed by the Provost Marshal, Hawaiian Department.

8.05. Parking of motor vehicles at any place within the Restricted Area, is prohibited, except as may be authorized by the Provost Marshal, Hawaiian Department.

8.06. The military authorities will erect such fences and barricades along the Described Line or anywhere within the Restricted Area as deemed proper for security and military necessity. Such other restrictions as shall be required for the Restricted Area shall be as designated from time to time by the Provost Marshal.

9. Protection of Waterfront Property.

9.01. Smoking by any person on or in any dock, wharf, tank farm, or warehouse located thereon in the Territory of Hawaii is prohibited, except in such places as may be designated for this purpose by the Captain of the Port.

9.02. No fire shall be built on or in any dock, wharf, tank farm, or warehouse located thereon in the Territory of Hawaii, without the written consent of the District Captain of the Post Officer or the Captain of the Port in which such dock, wharf, tank farm, or warehouse is located.

9.03. Nothing contained in this General Orders shall be construed as modifying or suspending any existing Federal or Territorial statute or any Proclamation or Executive Order of the President of the

Exhibit N—(Continued).

United States, or any General Orders of the Military Governor.

10. Emergency Waterfront Charge.

10.01 Castle & Cooke Terminals, Limited, hereby is authorized and directed to perform such duties with respect to the guarding of vessels, cargo and piers in Honolulu Harbor as it may be directed to do by the Director of Cargo and Passenger Control, Office of the Military Governor. Payment for such services as Castle & Cooke Terminals, Limited, performs pursuant to this Title 10 shall be made from the Emergency Waterfront Fund upon presentation of certified bills approved by the Director of Cargo and Passenger Control, Office of the Military Governor.

10.02. All vessels except harbor craft (including tugs and barges) based at Honolulu, berthed in Honolulu Harbor at any pier not under lease to or owned by the Federal Government, shall be charged and shall pay to the Emergency Waterfront Fund an Emergency Waterfront Charge. Effective forthwith, the Emergency Waterfront Charge shall be one cent ($0.01) per net registered ton for each half-day or fraction thereof that the ship is at the dock. The periods from Noon to Midnight and from Midnight to Noon shall each constitute a half-day.

10.03. The Board of Harbor Commissioners of the Territory of Hawaii is hereby designated as the fiscal agent of the Military Governor for the purpose of administering the Emergency Water-

Exhibit N—(Continued)

front Fund. All charges under the Emergency Waterfront Charge shall be made and collected by said Board and all receipts therefrom shall be deposited in the Bishop National Bank of Hawaii, at Honolulu, T. H., to the credit of the Emergency Waterfront Fund O.M.G. Disbursements shall be made on checks signed by the administrative officer of the Board of Harbor Commissioners and countersigned by the Finance Officer in the Office of the Military Governor.

10.04. Such funds as may be available in the Emergency Waterfront Fund shall be used to pay Castle & Cooke Terminals, Limited, for emergency patrol work and also to pay for such other expenses incidental to the guarding of vessels, cargoes, and piers in Honolulu Harbor as may be authorized and approved by the Director of Cargo and Passenger Control, Office of the Military Governor.

11. Security Regulations for Vessels in Port.

11.01. The following regulations quoted from Title 33, Chapter I, Part 6, Subpart E, approved by the President on 31 December 1942, issued pursuant to the authority contained in section 1, Title II, of the Espionage Act approved June 15, 1917, 40 Stat. 220 (U.S.C. title 50, sec. 191), as amended by the Act of November 15, 1941 (55 Stat. 763), and by virtue of the Proclamation and Executive Order issued June 27, 1940 (5 F.R. 2419), and November 1, 1941 (6 F.R. 5581), and as quoted in Port Security Order No. 1-43, 20 January 1943, respec-

Exhibit N—(Continued)

tively, are published for the information and guidance of, and compliance by, all concerned:

"Sec. 6.331. When Guards Shall Be Used: On all vessels guards shall be employed in accordance with the following schedule in addition to the crew requirements set forth under the section on manning:

(c) Fire Guards On self propelled vessels of 1000 gross tons or over when under repair a fire guard shall be maintained in each compartment or place in which there is in use portable apparatus such as for welding, burning, and riveting, or in which sparks or sufficient heat to cause combustion may be transmitted if such space or adjacent spaces contain combustible materials likely to become ignited, from the time such work is started until after it is completed.

"Sec. 6.332. How Guards Are Provided: The master, vessel owner, operator, and agent shall provide all guards required by the regulations in this subpart, except where such guards are provided by military authority.

"Sec. 6.380. Responsibility for Compliance by Crew and Others: The master, owner, operator, and agent of the vessel shall require strict compliance by the members of the crew, guards, and others with the regulations contained in this subpart and shall instruct them therein. Violations of the regulations contained in this—

Exhibit N—(Continued)

subpart shall be reported to the Captain of the Port.

"Sec. 6.381. Return to Ship in Emergency: When officers and men are ashore and a state of emergency is announced in the port, they shall endeavor to proceed with all possible speed to their ship.

"Sec. 6.382. Discussion of Ship's Business: Officers, crew members, and others shall not discuss ship's business or inform anyone of any anticipated movement of the vessel except as required in the line of duty and then only with persons having proper credentials. Ship's business shall not be discussed within the hearing of those not officially involved.

"Sec. 6.383. Possession of Binoculars and Telescopes: Binoculars and telescopes on vessels shall be in the possession of the master, officers and lookouts only.

"Sec. 6.384. Sailing Time: In no case shall a sailing time be posted or announced and every effort shall be made to keep information in relation thereto and to the future movements of the vessel secret.

"Sec. 6.385. Provision for Smoking: The master shall post a notice in a conspicuous place stating where smoking shall be and shall not be permitted aboard. In no case shall smoking be permitted:

(a) On weather decks when moored to a dock, pier, wharf, or other waterfront facility.

Exhibit N—(Continued)

(b) When loading or discharging explosives.

(c) In cargo spaces.

(d) When gas freeing ship's tanks or when loading Grade A, B or C liquid inflammable cargo in bulk, except that the master may permit smoking in lounge and mess rooms, in fire rooms when boiler fires are lighted, and in engine rooms when machinery is in operation."

11.02. The regulations set forth in this Title 11, and amendments thereto, shall be enforced by the Captains of the Port.

12. Kokee Restricted Area, Kauai District.

12.01. There is hereby created and established, in the interest of military necessity, a restricted military area consisting of the general area commonly known as the Kokee Area, on the Island of Kauai, Kauai District.

12.02. Civilians will be permitted to enter this Kokee Restricted Area and occupy summer residences therein only after having procured a pass from the Provost Marshal by applying at the Office of Civilian Affairs, Court House, Lihue, Kauai.

12.03. Passes will be issued to the owner or lessee of the property to be occupied, and to each member of the family, guests, servants, employees and to any workmen who may be engaged to perform contract labor about the premises. The name of the owner or lessee will appear on all passes issued, and he or she will be directly responsible

Exhibit N—(Continued)

for the observance of all regulations by any person issued a pass in the name of said owner or lessee.

12.04. Any violation of these regulations by the holder of a pass will subject all members of the household to the penalty of having their passes revoked.

12.05. Tradesmen and others having legitimate business in the Kokee area or in the vicinity of the restricted area may be issued passes. In the event of a violation of any regulation governing this area, the pass privilege of the tradesman or the concern whose representative was was guilty of the violation will be revoked.

12.06. The maximum speed for all vehicles, using the Kokee road North of the Belt Road junction, is 25 M.P.H.

12.07. A copy of this Title 12 shall be conspicuously posted in each occupied house in the Kokee area.

12.08. Strict compliance with all General Orders such as blackout and curfew will be observed. The use of trails and roads in the general vicinity of the CCC Camp is prohibited North and West of the boundary line between the districts of Waimea and Hanalei. The restricted area has been designated as a military reservation and is clearly marked by signs and fences.

12.09. Persons trespassing on the military reservation shall be subject to a fine of not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00), or by imprisonment for not

Exhibit N—(Continued)

more than one (1) year, or both fine and imprisonment.

13. Pali Road Restricted Area.

13.01. Pali Road Restricted Area hereby is designated and declared to be a military area and shall be that area on, adjacent to, or in the vicinity of the Pali Road on the Island of Oahu, Territory of Hawaii, from a point on the Honolulu side of said Pali Road one-quarter of a mile from the summit thereof to a point on the Kaneohe side where said Pali Road intersects Highway No. 1.

13.02. No person shall photograph, or take pictues from, on, in, or of, the Pali Road Restricted Area, or any portion thereof.

14. Penalty for Violations.

14.01. Any person who violates or evades, or attempts to violate or evade, any of the provisions of paragraphs 11.01 and 11.02, or any other provision of this General Orders, upon conviction thereof, shall be punished by confinement, with or without hard labor, for a period not to exceed one (1) year, or by a fine not to exceed One Thousand, Dollars ($1000.00), or by both such confinement and fine.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

Exhibit N—(Continued)

10 March 1943

GENERAL ORDERS No. 8

Identification and Registration

1. Purpose.
2. Central Identification Bureau.
3. Identification Passes for Entry to Military Establishments.
4. Solicitors.
5. Explosives and other Dangerous Materials.
6. Obsolete Passes.
7. Notice of Change of Address.
8. Registration of Laboratories.
9. Registration of Persons with Service in Armed Forces of Foreign Governments.
10. Wearing of Khaki Clothing by Civilians.
11. Brassards (Arm Bands) for Navy and Marine Officers.
12. Office of the Military Governor Brassard (Arm Band).
13. Penalty for Violations.

1. Purpose.

1.01. This General Orders is issued in the interests of internal security as additional protection against possible espionage and sabotage.

2. Central Identification Bureau.

2.01. The establishment of the Central Identification Bureau also known as C.I.B., as a bureau of the Office of the Military Governor, hereby is confirmed.

2.02. The function of the Central Identification

Exhibit N—(Continued)

Bureau shall be the issuance of means of identification to persons who are required to have such identification in order to gain access to military and naval reservations and other areas, and for such other purposes as may be required by Orders of the Military Governor.

2.03. Any applicant desiring a C.I.B. badge or other means of identification issued by it shall prepare the application form and such other data as may be required from time to time by the Bureau and personally present and submit the same at the office of said Bureau. The employer shall assist and supervise the preparation of such application and data for employees desiring such means of identification.

2.04. Any person receiving such means of identification shall, within forty-eight hours after expiration of the period of time for which it was issued, or within forty-eight hours after termination of the employment recited in such application as the basis for issuance thereof, deliver or mail such means of identification to the Central Identification Bureau.

2.05. No person shall copy or duplicate, or attempt to copy or duplicate, any such means of identification, or any part thereof, issued by said Bureau; nor shall any person secure, or attempt to secure, or aid or abet another person in securing, or attempting to secure, such means of identification under false pretenses; nor shall any person take, carry, remove, or send, or attempt to so do, any such means of identification from the Territory

Exhibit N—(Continued)

of Hawaii except seafaring persons who have been issued Captain of the Port badges as sanctioned by the Coast Guard; nor shall any person commit, or attempt to commit, a fraudulent use of any such means of identification; nor shall any person commit, or attempt to commit, a fraudulent entry to any military or naval reservation or other restricted military or naval area by use of such means of identification.

3. Identification Passes for Entry to Military Establishments.

3.01. Effective 15 March 1943, the Central Identification Bureau will be the authorized agency to issue passes to civilian personnel for entrance to military establishments, posts, air fields, and restricted areas. Identification passes will be issued by the C.I.B. only with the recorded prior approval of the commander responsible for security of the post or other installation concerned.

3.02. Identification passes will be issued according to the provisions of the following paragraphs.

3.03. The Standard Identification Pass. The Standard Identification Pass will consist of a badge, bearing the name and photograph of the person to whom issued, his duty or occupation, the establishment or area to which entry is authorized, a recorded serial number, and the impression seal of the Central Identification Bureau.

3.04. The "Special" Identification Pass. In all cases where the standard identification pass will not suffice, either because entry to more than one establishment or area is authorized, because the scope of

Exhibit N—(Continued)

authorized activities cannot be described on the standard identification pass, or because employment is of a temporary nature and may be at varying locations, a "Special" identification pass will be issued. The "Special" pass will be similar to the standard pass in all respects, except that on the "Special" pass a red band bearing the word "Special" will be substituted for the name of the restricted areas or establisments to which entry is authorized. The "Special" pass must be accompanied by an identification card pass bearing the same serial number as the "Special" pass, setting forth the restricted areas or establishments to which entry is authorized and the scope of the bearer's activities. The card pass, as well as the "Special" badge, will be required as authority for admittance to the designated areas.

3.05. Employers desiring passes for employees will submit a list of such employees to the Commanding Officer of each military establishment or restricted area to which entry is desired, stating in each case the name of the employee, the duty performed, and the installations or area to which admittance is desired. The Commanding Officer, if he approves, will refer the request to the C.I.B. where the history of each individual will be examined. The required form of badge will be issued by the C.I.B. to those individuals whose credentials are acceptable.

3.06. Commanding Officers of military establishments may at any time revoke the authority to enter. In such event, the C.I.B. will recall the badge,

Exhibit N—(Continued)

or "Special" badge and identification card, and if necessary will issue a new identification card, omitting the post, establishment, or area to which authority to enter has been revoked.

3.07. Where duties require enlisted men to enter regularly one or more restricted areas to which the soldier's uniform and identification tags are insufficient identification Commanding Officers will secure C.I.B. passes as prescribed above for civilians.

3.08. No passes other than the service identification card will be required of commissioned officers (of the Armed Services), except where a special pass for certain installations is prescribed by the Department Commander.

4. Solicitors.

4.01. The term "solicitor," as used in this Title 4, shall include, and hereby is defined to mean, any person who, within the Territory of Hawaii, goes from house to house, or from place to place, selling, soliciting, or taking orders for, or offering to sell or take orders for, farm products, goods, wares, merchandise, or memberships, shares, certificates, or similar interests in any group, club, lodge, or society. Insurance salesmen, persons who go from house to house or place to place to deliver newspapers or milk or to collect garbage or to pick up or deliver property of any kind, and agents, employees, or representatives of privately owned public utilities, who go from house to house or place to place, regularly or occasionally during the course of their employment, shall be deemed to be solicitors within the meaning of the provisions of this Title. It shall

Exhibit N—(Continued)

be no defense in the prosecution of any person charged with a violation of any of the provisions of this General Orders that such person did not demand, solicit, accept, or receive payment or deposit of money in connection with any of the aforesaid acts or matters; nor will it be necessary for the accuser or prosecutor to allege or prove, or for the Court to find, in any such prosecution that any such person so charged was regularly engaged or employed as a solicitor, but it will be sufficient to establish that such person is a solictor within the meaning of this General Orders if such person irregularly or occasionally does any of the acts mentioned in the first two sentences of this paragraph.

4.02. No person shall act as, or do an act as, or be, a solicitor within the Territory of Hawaii after March 15, 1943, without first having obtained a solicitor's identification card from the Central Identification Bureau of the Office of the Military Governor, at Honolulu, T. H. Solicitors shall retain their solicitor's identification card on their person at all times and exhibit such card upon demand by any municipal, territorial, or federal police officer, or upon demand by any duly authorized member of the United States Naval Intelligence or Military Intelligence Division. No person other than the person to whom such solicitor's identification card duly has been issued by the said Central Identification Bureau, shall possess or use in any manner, said solicitor's identification card.

4.03. None of the provisions of Paragraphs 4.01

Exhibit N—(Continued)

and 4.02 above shall be applicable to any person under sixteen (16) years of age, nor to any municipal, territorial, or federal employees.

5. Explosives.

5.01. Persons, corporations, partnerships and other associations handling explosives on wharves or harbor installations or transporting such explosives from place to place, will obtain for each person engaged in such transportation a special identification card from the Central Identification Bureau.

5.02. The identification card will be issued to the employer for distribution to the employee and will be returned to the Central Identification Bureau upon the separation of the employee from the services of the employer to whom it was issued. Absence from employment for three consecutive days without leave of absence will be equivalent to separation. Upon separation from employment the identification card becomes null and void and the person covered by it is not thereafter authorized to use it for any purpose. If the employee is reemployed, the old identification card must be surrendered to the Central Identification Bureau and a new one must be obtained. The employer, or his agent, is charged with obtaining the identification card from any employee who is separated from the employer's services and, in the event such identification card is not recovered, a report of this fact will be submitted to the Central Identification Bu-

Exhibit N—(Continued)

reau within seven (7) days after the date of separation from service.

5.03. In the event that explosives are to be transported in vehicles on the roads and highways of the Territory of Hawaii they will be covered by tarpaulin or other similar type of covering and securely lashed. There will be placed in a conspicuous location on the front and rear of each vehicle loaded with explosives moving singly on roads and highways, a red placard or sign with the words "Danger—Explosives" painted in white letters not less than five (5) inches in height. Two or more vehicles carrying explosives and traveling in convoy will have a similar sign on the front of the leading vehicle and on the rear of the last vehicle and will be accompanied by military police escort. On the Island of Oahu, call 1211, local 97, for escorts. On other islands, call the District Provost Marshal for escorts.

5.04. In the event explosives are to be handled in or transported from, to or through a military or naval installation (restricted areas and zones included) the written approval of the Commanding Officer or the Officer in Charge of that installation must be obtained prior to any movement. In the case of the restricted waterfront area as defined and delimited by General Orders No. 7, the written approval of the Captain of the Port, Honolulu, or other officer designated by him, shall be obtained prior to any explosive being handled in or transported from, to, or through such restricted area.

Exhibit N—(Continued)

5.05. Nothing herein contained shall be deemed to limit the jurisdiction granted by statute, executive order, or regulation to any Federal agency over harbors, wharves, docks or other harbor facilities and activities therein. Any person transporting explosives shall comply fully with the Federal Explosives Act of December 26, 1941, (Public Law 381 77th Cong.) and the regulations issued pursuant thereto, and all Territorial statutes and Municipal Ordinances with reference thereto.

5.06. In addition to the above requirements of this Title 5, the following regulation shall be applicable to civilians and government agencies in the Kauai District having explosives on hand:

Commencing with the effective date of this General Orders any changes in inventories of all explosives on hand will be reported to the District Engineer for the Office of Civilian Affairs within 24 hours, showing location of explosives, quantities, types and strength.

Shipments into the County and District of Kauai will be reported by the Army Transport Service to the District Engineer upon arrival.

No explosives may be shipped out of the Island without the prior approval of the District Engineer.

The District Engineer will maintain an inventory of all explosives on the Island, will make frequent inspections of all explosive dumps, will verify reports and will check on the condition of the explosives and storage facilities.

6. Obsolete Passes.

6.01. Every person to whom a pass or an identi-

Exhibit N—(Continued)

fication badge has been issued for entry to a military or naval reservation, or a national defense project, who is not at present employed on the military or naval reservation, or national defense project, for which such pas or badge was issued, and every person whose pass to enter any such reservation or project has expired, or which has been declared cancelled or has just been recalled by the issuing authority and who now has such pass or badge in his possession, shall forthwith deliver or mail such pass or badge to the Central Identification Bureau, Honolulu, T. H.

6.02. No person who is at present not employed on the military or naval reservation, or national defense project, for which he was issued a pass or an identification badge, and no person whose pass to enter a military or naval reservation has expired, or has been declared cancelled or has been recalled by the issuing authority, shall use such obsolete pass or badge to gain entry to any such reservation or project by the use of such pass or badge.

6.03. Any person who shall lose any badge or pass mentioned in this General Orders, or whose badge or pass has been destroyed, mutilated, or defaced, shall report said loss, destruction, or mutilation in person to the Central Identification Bureau, within forty-eight (48) hours thereafter.

7. Notice of Change of Address.

7.01. The term "residence," as used in Paragraphs 7.02 and 7.03 below, shall include, and hereby is defined to mean, the house, cottage, apartment, or other place of residence or abode, being cur-

Exhibit N—(Continued)

rently and immediately used and occupied within the Territory of Hawaii by the person or persons to whom reference is made in said Paragraphs 7.02 and 7.03. It is not intended that the term "residence," as used in said Paragraphs 7.02 and 7.03 shall refer to or include a residence or domicile without the Territory of Hawaii, nor the permanent residence or domicile of such person within the Territory of Hawaii unless such permanent residence or domicile is also the place of abode being currently and immediately used and occupied within the Territory of Hawaii by such person and in which such person actually lives.

7.02. Any person within the Territory of Hawaii, who, heretofore has furnished, or hereafter shall furnish, a Personal History Declaration to the Central Identification Bureau of the Office of the Military Governor or to any office, officer, agency, agent, or department of the United States Navy or of the Army of the United States, or to any office, officer, agency, agent, or department of the United States, and who subsequent to the date hereof and after having so furnished such Personal History Declaration, shall change his or her residence within the Territory of Hawaii, shall, within seventy-two (72) hours after so changing such residence, notify the said Central Identification Bureau in writing, or in person, of the fact that such person has changed such residence and of the residence address which said person has acquired or obtained by reason of said change of residence, and, if a telephone is available to such person at the

Exhibit N—(Continued)

said residence address so acquired by such change, the number thereof.

7.03. Any person, who prior to the date hereof, shall have so furnished such a Personal History Declaration and who has heretofore changed his or her residence, and failed, neglected, or refused to furnish his or her current residence address to said Central Identification Bureau, shall not later than April 1, 1943, furnish said current residence address and telephone number, if any, in writing or in person, to said Central Identification Bureau.

8. Registration of Laboratories.

8.01. The owner or owners, director or directors, proprietor or proprietors, or other person or persons in charge of each laboratory in the Territory of Hawaii, whether such laboratory be a public or private laboratory, or a commercial, research, or educational laboratory, or a laboratory of a kind or nature other than that specifically mentioned herein, shall forthwith register such laboratory either by mail or in person, with the Office of the Military Governor of the Territory of Hawaii at Honolulu, T. H., by furnishing said office with a signed written statement containing the following pertinent information relative to such laboratory, to wit:

Name of laboratory;

Address of laboratory;

Ownership;

Type of work done in laboratory;

A list of all personnel, including the director, stating the name, age, address, birthplace, nationality, and type of work done by each in the

Exhibit N—(Continued)

laboratory. This list shall include similar information in the case of all personnel employed in, or associated with the laboratory within the past five years, and shall give their present addresses if known.

8.02. A laboratory, for the purposes of this General Orders shall be defined to mean, and shall include, any institution, establishment, business, place, or agency, engaged in chemical, bacteriological, or pathological investigation as an aid to industry, medical practice, experimentation, or teaching.

8.03. Laboratories heretofore registered under prior General Orders of the Military Governor are hereby expressly exempted from the requirement as to registration contained in the provisions of Paragraph 8.01 above.

8.04. Access will be afforded at all times to the Military Governor or his representative for inspection of all laboratories required to be registered by the provisions of this General Orders.

8.05. Any change in the status or personnel of a laboratory, or in any information furnished the Office of the Military Governor pursuant to this Title 8, shall be reported to said office in writing immediately after such change.

9. Registration of Persons With Service in Armed Forces of Foreign Governments.

9.01. Any person present within the Territory of Hawaii who has had service in the armed forces of any government or country other than the United States will forthwith report and submit, in

Exhibit N—(Continued)

triplicate, to the nearest police station, a full and complete statement as to such service on the form provided for that purpose by the Military Governor. Such police stations will immediately forward these reports to the Office of the Military Governor.

9.02. Any such person hereafter entering the Territory of Hawaii shall so report and submit such statement within five (5) days after entry.

9.03. The term "service in the armed forces" shall mean service in the Army, Navy, Police Department, Intelligence Service, or other investigative agency, or any other military or naval branch or division, and shall also include attendance in any school, college or other institution of learning, teaching or giving R.O.T.C. training or its equivalent, or any other military or naval training or preparation.

9.04. The provisions of this Title 9 shall not apply to enemy aliens who have heretofore registered such service, nor shall it apply to members of the Armed Forces of the United States.

10. Wearing of Khaki Clothing by Civilians.

10.01. The wearing by other than service personnel of the duly prescribed uniform for the United States Army, Navy, Marine Corps, and Coast Guard, or similar clothing is prohibited.

10.02. The following rules will govern the wearing of outer articles of the prescribed uniform by other than service personnel:

Khaki shirts khaki trousers, and steel helmets may be worn while on duty by members of law enforcement and other governmental

Exhibit N—(Continued)

agencies, and such civilian organizations as may be designated by the Military Governor.

The khaki shirt together with the khaki trousers may be worn by civilian guards and certain other civilians engaged on duties with Army or Navy installations which require the wearing of such clothing while on duty at their specified place of work, but such clothing may not be worn away from the place of duty or on the streets. Authority to wear khaki clothing for this purpose must be obtained from the Military Governor or his District Representative, by the officer in charge of the activity under whom the civilian is working.

All other civilians may wear either the khaki trousers or khaki shirts at any time or place, but a combination of a khaki shirt and khaki trousers or other clothing which is similar to the Army, Navy, or Marine uniforms is prohibited.

11. Brassards (Arm Bands) for Navy and Marine Officers.

11.01. The Commandant, Fourteenth Naval District, has prescribed the wearing of brassards (arm bands) by certain designated Navy and Marine officers while on official duty outside naval reservations. The brassards are described as follows:

For officers of the Fourteenth Naval District: Gold lettering "14ND" on a white flannel background, brassards measuring four inches wide by eleven inches long, lettering 3⅛ inches long by ½ inch wide.

Exhibit N—(Continued)

For officers of the Naval Transportation Service on official missions involving special identification: Blue lettering "NTS" on a white flannel background, brassard measuring four inches wide by eleven inches long, lettering 3⅛ inches long by ⅝ inch wide.

For officers of the Supply Corps on official missions: Green lettering "SD NYPH" on a white flannel background, brassard measuring four inches wide by eleven inches long, lettering 1⅝ inches long by ⅜ inch wide.

11.02. All military and civilian personnel are instructed to pass officers wearing the brassards described hereinabove with the least possible delay.

11.03. The Provost Marshal, Hawaiian Department, will be furnished by the Commandant, Fourteenth Naval District, with a list of the officers authorized to wear brassards.

12. Office of the Military Governor Brassard (Arm Band).

12.01. Officers and enlisted men of the Army of the United States, except Military Police, on duty in the Office of the Military Governor, will wear a brassard (arm band) on the left arm as follows:

Green band, three inches wide with the letters "OMG" thereon in white.

12.02. All military and civilian personnel are instructed to pass persons wearing such bands with the least possible delay.

12.03. The Executive of the Military Governor will furnish to the Provost Marshal the name of

Exhibit N—(Continued)

each person on duty in the Office of the Military Governor who is authorized to wear a brassard as described in Paragraph 12.01 above.

13. Penalty for Violations.

13.01. Any person, firm, or corporation, who or which violates, refuses, fails, or neglects to comply with any of the provisions of this General Orders, or furnishes any false information in compliance with any of the provisions of this General Orders, or who or which evades or attempts to evade any of the provisions hereof, upon conviction thereof, shall be punished by confinement with or without hard labor not to exceed five (5) years, or by a fine not to exceed Five Thousand Dollars ($5,000.00), or by both such confinement and fine.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

—

10 March 1943

GENERAL ORDERS No. 9
Communications

1. Purpose.
2. Telephone.
3. Radio Regulations.
4. Radio Dealers' Regulations.
5. Signal Representative, Office of the Military Governor.
6. Use and Operation of Electrical Diathermy Type Machines.

Exhibit N—(Continued)

7. Photographic Materials Rules.
8. Cameras and Photography.
9. Carriage of Information to the Mainland.
10. Pigeons.
11. Penalty for Violation.

1. Purpose.

1.01. This General Orders is issued in the interests of internal security as additional protection against possible espionage and sabotage.

2. Telephone.

2.01. All activities of the Mutual Telephone Company except those activities associated with the Transpacific Radiotelephone Service, are placed under the control of the Department Signal Officer for the purpose of providing the maximum use of the facilities to the armed forces. The Department Signal Officer will supervise the use and disposition of all stocks of supplies and equipment on hand or received by the Mutual Telephone Company.

2.02. No action of any nature will be undertaken by any official of the Mutual Telephone Company at any time which would operate to interfere with or deprive the armed forces of the maximum use of any facility of the Mutual Telephone Company now available or which may become available, without prior approval of the Department Signal Officer.

3. Radio Regulations.

3.01. Definitions. For the purpose of this General Orders, unless the context otherwise requires, the following terms and equivalent expressions shall have the following respective meanings:

Exhibit X.—(Continued)

"Person" shall mean any individual, partnership, company, association, corporation, agency or other organized group of persons.

"Radio equipment" shall mean any parts, sets, equipment, or supplies that are designed for or are capable of being used for reception, transmission or amplification of radio waves.

"Transmitting equipment" shall mean any equipment or apparatus or parts thereof capable of being used or converted into apparatus for the transmission of radio frequency energy, including but not by way of limitation, all transmitting sets, phonograph oscillators, signal generators, or other such apparatus or equipment which it may be deemed necessary to impound for the preservation of the security of the Territory of Hawaii.

"Short-wave receiver" shall mean any radio set or equipment capable of receiving broadcasts on frequencies other than those between 550 kilocycles and 1750 kilocycles.

"Frequency modulated receiver" shall mean any radio set capable of frequency modulation reception or any frequency modulation adapter.

"Household" shall mean those individuals sharing a common dwelling, as a family.

"Broadcast band receiver" shall mean any radio receiver designed for or altered to receive only radio waves between 550 kilocycles and 1750 kilocycles including additional radio tubes possessed for and only in conjunction with such radio receiver.

"Operate" shall mean to use or to keep in such manner that it is available for use.

Exhibit N—(Continued)

"Possess" shall mean belonging to or in the possession, custody, or control of.

"Governmental Agency" shall mean any authorized Army, Navy, Federal, Territorial or City agency.

"Dealer" shall mean any person other than the ultimate consumer engaged in the importation, purchase, sale, loan, construction, or repair of radio equipment.

"Signal Representative" shall mean the Signal Representative, Officer of the Military Governor, as designated in this General Orders.

3.02. No enemy alien or household of which an enemy alien is a member shall possess or operate any radio equipment other than a broadcast band receiver.

3.03. No person shall operate a short-wave receiver or frequency modulated receiver in such manner that the reception is accessible directly or indirectly to any enemy alien, nor allow or permit an enemy alien to operate a short-wave receiver or frequency modulated receiver.

3.04. No person except governmental agencies and licensed dealers, shall possess any transmitting equipment unless such transmitting equipment shall be registered with the Signal Representative and authorization for such possession granted not later than five (5) days from the date of this General Orders, except that persons who have already registered with the Signal Representative and have secured his authorization for possession need not register nor secure such authorization again.

Exhibit X—(Continued)

3.05. No person except governmental agencies and licensed dealers shall possess any frequency modulated receiver.

3.06. Short-wave and frequency modulated receivers, the possession of which is prohibited, shall be altered by the United States Army Signal Corps.

3.07. All radio equipment, the possession of which is prohibited, shall be delivered to any Police Station for custody.

3.08. Application for authorization of possession of transmitting equipment will be made to the Signal Representative on Form S/R-108, supplied by him.

3.09. On the Island of Oahu all correspondence, applications, reports, or appeals in connection with Paragraphs 3.01 to 3.08 above will be submitted directly to the office of the Signal Representative, Komatsuya Hotel, 491 North King Street, Honolulu, T. H. On all other islands it will be submitted through the Service Command of that island.

4. Radio Dealers' Regulations.

4.01. Definitions. For the purpose of this General Orders, unless the context otherwise requires, the following terms and equivalent expressions shall have the following respective meanings:

"Class 'A' controlled item" shall mean any item of radio equipment classified as a class "A" controlled item by the Military Governor.

"Class 'B' controlled item" shall mean any item of radio equipment classified as a class "B" controlled item by the Military Governor.

"Deal in" shall mean any importation, purchase,

Exhibit N—(Continued)

sale, loan, repair or other transaction or disposition.

All definitions given in Paragraph 3.01 of this General Orders shall apply equally to the following paragraphs.

4.02. No person shall deal in radio equipment unless licensed by the Signal Representative upon application as provided herein made not later than five (5) days from the date of this General Orders, except that persons who have secured the prescribed license from the Signal Representative prior to the date of this General Orders need not secure such license again.

4.03. No class "A" controlled items may be sold except upon presentation of a purchase permit issued by the Signal Representative.

4.04. No person shall purchase at any one time any class "B" controlled item in excess of the limit stated herein, unless upon presentation of a purchase permit issued by the Signal Representative. The amount may be limited by number, by replacement, or both. No sales or purchases in excess of previous normal sales shall be made.

4.05. No person except a licensed repairman shall repair, alter, modify or tamper with any radio, or remove or mutilate any seal attached to any radio which has been altered by the Signal Corps under the provisions of any General Orders of the Military Governor.

4.06. No sales of radio supplies or equipment shall be made to any person without presentation of a Territorial Identification Certificate, or military or naval identification card or tag showing their

Exhibit X—(Continued)

non-enemy alien citizenship status. No sales of radio equipment, except receiving tubes, shall be made to any enemy alien except upon presentation of a purchase permit issued by the Signal Representative.

4.07. The provisions of Paragraph 4.04 of this General Orders shall not apply to purchases and sales of authorized purchasing officers of governmental agencies.

4.08. Individuals, not enemy aliens, making purchases or sales with licensed dealers or other persons not enemy aliens shall be excepted from the prohibitions of Paragraph 4.02 of this General Orders.

4.09. Persons desiring to purchase any class "A" controlled item or any class "B" controlled item in excess of the limitation may obtain a purchase permit from the Signal Representative authorizing such a purchase.

4.10. Upon designation of a class "A" controlled item all dealers shall make an inventory of all such items they possess or which they shall receive subsequent to such classification. This inventory will be submitted to the Signal Representative within three (3) days of such classification.

4.11. In the purchase of class "B" items controlled by "replacement" it shall be necessary for the person purchasing such items to turn in to the dealer an equal unserviceable item before sale of a new item shall be made.

4.12. All radio equipment which shall be received

Exhibit N—(Continued)

by dealers in accordance with Paragraph 4.11 above, shall be reported monthly to the Signal Representative who shall make disposal commensurate with the salvage value of the equipment.

4.13. Licensed dealers who shall make repairs on altered radio sets shall do so in accordance with instructions issued by the Signal Representative. A report of each altered set repaired will be made within five (5) days of completion of repairs on Form S/R-106, which may be obtained from the Signal Representative.

4.14. The following items are designated as class "A" controlled items:

Amplifiers
Audio Oscillators
Frequency Modulated Adapters
Frequency Modulated Receivers
Phonograph Oscillators
Signal Generators
Transmitters

4.15. The following items are designated as class "B" controlled items: Items limited in sale by number are designated by a figure and items limited in sale by replacement are indicated by "R":

Chokes	—R
Coils	—R
Condensors	—R
Insulators	—R
Radio Receivers	1
Radio Tubes (all types)	—R
Transformers (all types)	—R

Exhibit N—(Continued)

4.16. Application for license will be submitted on Form S/R-101.

4.17. Purchase permits will be obtained on the Island of Oahu from the office of the Signal Representative, Komatsuya Hotel, 491 North King Street, Honolulu, T. H. On all other islands purchase permits will be obtained from the Service Command of that island.

4.18. All correspondence will be submitted in accordance with Paragraph 3.09 of this General Orders.

5. Signal Representative, Office of the Military Governor.

5.01. The Department Signal Officer, Headquarters Hawaiian Department, is designated as Signal Representative, Office of the Military Governor. The Department Signal Officer may designate Assistant Signal Representatives to whom he may delegate the powers granted herein in such degree as he may deem necessary.

6. Use and Operation of Electrical Diathermy Type Machines.

6.01. No person, firm or corporation shall use or operate, or cause to be used or operated, any electrical diathermy type machine, unless such person, firm, or corporation first secures a license issued by the Military Governor permitting such use or operation.

6.02. Any person, firm, or corporation, who owns, operates, or has custody of any electrical diathermy type machine on the Island of Oahu will

Exhibit N—(Continued)

cause the same to be registered immediately at the Signal Representative's Office located at the Komatsuya Hotel, 491 North King Street. Any person, firm, or corporation who owns, operates, or has custody of any electrical diathermy type machine on any of the other Islands in the Territory of Hawaii, will immediately cause the same to be registered with the District Commander of the island upon which it is located. The provisions of this Paragraph 6.02 shall not apply to any person, firm, or corporation who has heretofore registered such machine pursuant to prior General Orders of the Military Governor.

6.03. A Board of Officers, consisting of a Signal Officer and a Medical Officer is hereby authorized to grant licenses for the use and operation of electrical diathermy type machines in accordance with such rules and regulations as they may prescribe. Licenses heretofore issued by said board under prior registrations hereby are ratified and confirmed, and such licenses hereby are deemed to authorize the use and operation of such electrical diathermy type machines on the same basis, and subject to the same rules and regulations, as though such licenses had been issued under the provisions of this General Orders.

6.04. Any diathermy type machine for which a license to operate is not issued shall be impounded by the Signal Representative, and a receipt therefor will be issued to the owner thereof, if known, or to the person from whom possession thereof is taken.

6.05. The transfer, sale, or other disposition of

Exhibit N.—(Continued)

any electrical diathermy type machine is prohibited unless written consent is obtained from the Military Governor. Such consent may be obtained at the office of the Signal Representative.

6.06. No electrical diathermy type machine shall be imported into the Territory of Hawaii without the written consent of the Military Governor.

7. Photographic Materials Rules.

7.01. The sale or other disposition of photographic supplies or equipment to any consignee in abnormal or excessive quantities by any wholesale dealer or importer from stocks on hand or to be received which would operate to deprive the use thereof, or otherwise interfere with the supply of, such supplies or equipment to the military or naval authorities is prohibited.

7.02. Prior to delivery to any consignee by any wholesale dealer or importer of photographic supplies or equipment of quantities from stocks on hand or to be received which are abnormal or in excess of amounts normally disposed of, such dealer or importer shall secure a clearance permit from the Signal Representative, Office of the Military Governor, authorizing such sale or disposition.

8. Cameras and Photography.

8.01. No person other than a person first duly authorized to do so by competent military or naval authorities shall use any camera on any beach in the Territory of Hawaii or use any camera while in, on, or about any airplane, boat, or ship, in waters or air within the Territory of Hawaii or encompassing the said area.

8.02. No person other than a person first duly

Exhibit N—(Continued)

authorized to do so by competent military or naval authorities shall photograph or take pictures from, in, on, or of, any military or naval reservation, post, arsenal, proving ground, range, camp, fort, yard, station, district, or restricted military or naval area, or any portion thereof; any shoreline within the Territory of Hawaii; or any military or naval installation, equipment, aircraft, weapons, ammunition, vehicles, ships, vessels, instruments, engines, manufacturing machinery, tools, devices, or any other equipment whatsoever in the possession or use of the Army or Navy, or in the course of experimentation, development, or manufacture, for delivery to and use by the Army or Navy.

9. Carriage of Information to the Mainland.

9.01. No person shall carry to the mainland, or elsewhere for transportation to the mainland, by clipper, ship, or otherwise, any written or printed matter whatsoever, or any photographs, sketches, or drawings, which have not been censored and so marked by a duly authorized censor.

9.02. No person shall send or deliver to another person any written or printed matter whatsoever, or any photographs, sketches, or drawings, for the purpose of having such other person carry such matter to the mainland to avoid censorship.

9.03. No person shall evade, or attempt to evade, censorship by indicating on any envelope, or other container, that the matter contained therein has been censored by a duly authorized censor, or by the re-use of censor labels or by the use of envelopes

Exhibit N—(Continued)

or other containers upon which a censor's stamp, or other means indicating censorship, has been used; or to attempt in any other manner or by any other means to evade the local censorship requirements.

10. Pigeons.

10.01. No person shall without the express written permission of the Military Governor transport, carry, or deliver any carrier or homing pigeon, or any other pigeon or bird having the characteristic and ability to carry and transmit a message, code, or writing, from one place to another within the Territory of Hawaii for the purpose of permitting it, or causing it, to fly.

10.02. No person shall send or transmit any message, writing, or code by means of such birds as are described in Paragraph 10.01 above within the Territory of Hawaii.

10.03. The provisions of Paragraph 10.01 and 10.02 above shall not apply to the armed forces of the United States or other governmental units thereof.

11. Penalty for Violations.

11.01. Any person, firm, or corporation who or which violates or evades, or attempts to violate or evade, any of the provisions of this General Orders, shall, upon conviction thereof, be punished by confinement, with or without hard labor, for a period not to exceed five (5) years, or by a fine not to exceed Five Thousand Dollars ($5,000.00), or by both such confinement and fine.

Exhibit N—(Continued)

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive.

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10 March 1943

GENERAL ORDERS No. 10

Labor

1. Policy.
2. Registration.
3. Employment.
4. Wages.
5. Hours of Work and Overtime.
6. Use of Labor.
7. Appeal Agency.
8. Child Labor.

1. Policy.

1.01. The following policies are announced for the information and guidance of employers employing the services of (a) employees of the United States under the War Department or the Navy Department; (b) workers employed on construction and other projects under the War Department or the Navy Department; (c) stevedores and other workers employed on docks and dock facilities; and (d) employees of public utilities. The same policies shall be equally applicable to employees of the above-mentioned employing agencies.

2. Registration.

2.01. Any person, now or hereafter employed by

Exhibit N—(Continued)

any of the employers to whom reference is made in Paragraph 1.01, and who ceases to be so employed, shall, within two (2) days after ceasing to be so employed, register or re-register with the nearest office of the United States Employment Service.

2.02. Every employer described in Paragraph 1.01 shall notify the nearest office of the United States Employment Service on Form USES-(H)1, prescribed by the United States Employment Service, of any employee added to such employer's payroll and on Form USES-(H)2, prescribed by the United States Employment Service, of any employee dropped from such employer's payroll, within two (2) days thereafter.

2.03. Any person, firm, or corporation who violates, refuses, fails or neglects to comply with any of the provisions of Paragraphs 2.01 and 2.02 above, upon conviction thereof, shall be fined not more than One Thousand Dollars ($1,000.00), or be imprisoned for not more than one (1) year, or both.

3. Employment.

3.01. Employers described in Paragraph 1.01 may maintain their own labor recruiting facilities.

3.02. The United States Employment Service hereby is designated as the central employment agency for the distribution of civilian labor hereby required to register, and shall allocate labor in the fulfillment of employers' requisitions in accordance with priorities established by the Office of the Military Governor.

3.03. No employer described in Paragraph 1.01

Exhibit N—(Continued)

shall employ or offer to employ an individual formerly, now, or hereafter in the employment of other such employers, unless and until such individual shall have presented to the employing agency a bona fide release without prejudice, on Form USES-(H)2, from his last previous employer or from the Director of Labor Control, and evidence of registration on Form USES-350, or Form USES-506.

3.04. Any individual, who is, has been, or hereafter shall be, employed by any employer described in Paragraph 1.01, who presents himself to any other such agency and secures or attempts to secure employment without having a bona fide release without prejudice from his last previous employer, or from the Director of Labor Control, or in any way misrepresents his employment status with regard to such release, shall, upon conviction, be fined not more than two hundred dollars ($200.00), or be imprisoned for not more than two (2) months, or both.

3.05. Any employer or employer's agent who shall cause any individual to be employed in contravention of Paragraph 3.03 hereof, shall, upon conviction, be fined not more than two hundred dollars ($200.00), or be imprisoned for not more than two (2) months, or both.

4. Wages.

4.01. Revised Wage Schedule No. 9, dated 3 May 1942 and effective at the beginning of the first payroll period after 3 May 1942, hereby is designated as the standard wage scale for workers engaged in work on construction and other projects under the

Exhibit N—(Continued)

War Department, or the Navy Department. No person seeking work or employed on construction or other projects under the War Department or the Navy Department, shall be employed at a rate less than, or in excess of the standard rate for the job as listed in Wage Schedule No. 9, and as same may be revised from time to time, as approved by the Military Governor.

4.02. Federal agencies under the War Department or the Navy Department shall continue their regularly established wage schedules.

5. Hours of Work and Overtime.

5.01. Normal work week for employees on construction and other projects under the War Department or the Navy Department shall be six (6) days of eight (8) hours each. The maximum number of hours worked in any seven (7) consecutive days shall not exceed fifty-six (56), except in cases of emergency and with the approval of the Chief of Military or Naval Service concerned.

5.02. Normal work week for employees of the United States under the War Department or Navy Department shall conform to applicable Federal regulations.

5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate for overtime in excess of forty-four (44) hours per week, or in excess of eight (8) hours in any one day. Double the regular rate will be paid for work performed on the seventh consecutive work day. One and one-half the

Exhibit N—(Continued)

regular rate will be paid for work performed on any of the following days only: New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day.

5.04. Paragraph 5.03 above shall not apply to employees who are in a supervisory capacity on a monthly salary basis.

5.05. Employees of the United States under the War Department and the Navy Department shall be paid overtime in accordance with applicable Federal regulations.

5.06. For employees engaged on construction and other projects under the War Department and the Navy Department, work shall be so scheduled that all employees shall receive one (1) day off in seven (7). Sunday work per se shall not be considered overtime, and no overtime shall be paid for Sunday except when it is worked consecutively in excess of six (6) days.

5.07. The provisions of any contract between individual employees, labor unions, and employers engaged on construction and other projects under the War Department or the Navy Department, in conflict with the provisions of this General Orders hereby are suspended.

6. Use of Labor.

6.01. Terms of labor contracts between individuals and employers engaged on construction and other projects under the War Department or the Navy Department which restrict or specify the nature of work to be performed, hereby are suspended.

Exhibit N—(Continued)

6.02. Any person now or hereafter employed by any employer described in Paragraph 1.01 hereof shall report regularly to the job to which he is ordered by said employer.

6.03. Employers and employers' agents described in Paragraph 1.01 are directed to refrain from discriminatory practices toward employees with regard to releases or other matters relating to termination of employment.

6.04. No employer or employer's agent shall fail or refuse to abide by the decisions of the Director of Labor Control on any matters within the meaning of Paragraph 6.03.

6.05. Any person, firm or corporation who or which violates, refuses, fails, or neglects to comply with any of the provisions of Paragraphs 6.01 to 6.04 inclusive, or who or which evades or attempts to evade any of the provisions of said Paragraphs 6.01 to 6.04, inclusive, upon conviction thereof, if a natural person, shall be punished by confinement, with or without hard labor, not to exceed two (2) months, or by a fine not to exceed two hundred dollars ($200.00), or by both such confinement and fine, or, if a corporation or other than a natural person, by a fine not to exceed two hundred dollars ($200.00).

7. Appeal Agency.

7.01. Persons discharged with prejudice from employment with employers mentioned in Paragraph 1.01 hereof, may appeal their cases to the Appeal Agency, Office of the Director of Labor

Exhibit N—(Continued)

Control, for decision as to whether or not they may be allowed to continue work with another employer.

7.02. The Director of Labor Control, Office of the Military Governor, hereby is designated as the Appeal Agency for persons discharged with prejudice by employers described in Paragraph 1.01. Any individual not satisfied with the decision of the Appeal Agency may appeal his case to the Labor Control Board of the Military Governor.

8. Child Labor.

8.01. Employers described in Paragraph 1.01 shall comply with the provisions of Section 18 of Chapter 259-B of the Revised Laws of Hawaii 1935, as enacted by Act 237 of the Session Laws of Hawaii 1939, as amended by Act 319, Session Laws of Hawaii, Regular Session 1941.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

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10 March 1943

GENERAL ORDERS No. 11

Military Property

1. Purpose.
2. Military Property Comptroller.
3. Internee and Evacuee Property Coordinator.
4. Japanese Motion Picture Film.
5. Firearms and Weapons.

Exhibit N—(Continued)

6. Pyrotechnics.
7. Penalty for Violations.

1. Purpose.

1.01. This General Orders is issued in the interests of internal security as additional protection against possible espionage and sabotage.

2. Military Property Comptroller.

2.01. There is hereby created the office of Military Property Comptroller, to operate as an agency of the Office of the Military Governor.

2.02. All civilian and military components, except Provost Courts and Military Commissions, which have taken possession of, commandeered, confiscated, or otherwise received or shall hereafter take possession of, commandeer, confiscate or otherwise receive property of any kind or nature, either by authority of the General Orders issued by the Office of the Military Governor or otherwise, shall give receipt therefor in the following form:

.....

(Issuing Agency)
Honolulu, T. H.

No.....
Date.....

This certifies that the undersigned has received from .....
(Name of Individual) (Address)
the following articles which were surrendered in accordance with military Orders:

.....

(Signature of Agent Receiving)

Exhibit N—(Continued)

2.03. The receipt shall contain adequate description of each item of property it covers, be made in duplicate, numbered, dated and signed by the Receiving Agent. The original of the receipt shall be issued to the owner of the property described thereon or the person from whom the property was received; the duplicate of the receipt shall contain the following additional statement which shall be signed by the owner or person surrendering the property:

"I hereby certify that the above is a complete list of articles which I have surrendered to the Agency indicated on this date."

.....

(Signature of Owner)

2.04. Each civilian or military component which has received or shall receive property as in Paragraph 2.02 above, shall prepare in triplicate a list of all such property showing each item received and the number of the receipt issued therefor. One copy of such list shall be delivered to the Military Depository having or to have actual possession of the property along with the property or as soon as possible thereafter if the property has already been delivered. One certified copy of such list shall be delivered by the Military Depository together with the duplicates of all receipts issued by the Agency concerned to the Military Property Comptroller. The Military Property Comptroller shall return all duplicate receipts to the Military Depository having actual possession of the property. Each item of property shall have attached thereto a tag or

Exhibit N—(Continued)

other identification mark showing the name of the owner and the number of the receipt issued therefor.

2.05. Receipts shall be issued and lists made for all property taken since 7 December 1941. Where the owner is not known, such fact shall be certified by a Responsible Authority of the issuing Agency on the original and duplicate of the receipt. Every effort shall be made by Agencies receiving property in the first instance to locate the owner thereof and obtain his verification.

2.06. After the property has been properly tagged, the duplicates of the receipts representing property in possession of each Military Depository shall be filed in numerical order and held by it. Each such Military Depository shall prepare and keep on file a complete inventory of all alien property held by it, in addition to the above mentioned list, and shall note on said inventory its estimate of the present value of each item thereon and the estimate of a qualified appraiser if available.

2.07. It is the purpose of this procedure to establish accountability so that there will be available complete records for the settlement of all claims in connection with property so taken, confiscated, commandeered, or otherwise received.

3. Internee and Evacuee Property Coordinator.

3.01. There is hereby established an Internee and Evacuee Property Coordinator of this office with offices in the Immigration Station, Honolulu, T. H., to administer the policy of the Military Governor in regard to the security and settlement of property

Exhibit N—(Continued)

belonging to persons interned, evacuated or otherwise separated from their propery by military order.

3.02. All plans for action whereby civilians are removed or separated from their property by military order will be cleared with the Property Coordinator before action is taken.

3.03. In all instances of separation or removal of civilians from their real or personal property by military order, where reasonable property settlements cannot be immediately accomplished, or where it is felt that extraordinary loss will result from internment or evacuation, or where attempts are being made to exploit the fact of internment or evacuation, the Property Coordinator will be notified by any person or persons having an interest in such property.

3.04. The intgnee and Evacuee Property Coordinator and his assistants are agents of the Military Governor only and regardless of certain administrative assistance provided by this office, the Property Coordinator and his assistants will not be held agents of, nor responsible to, any person separated or removed from his property by military order.

4. Japanese Motion Picture Film.

4.01. Definitions: As used in this order, the term "Japanese motion picture film" shall include the following:

Any motion picture film made, manufactured or produced in Japan.

Any motion picture film made, manufactured or produced under Japanese control; and

Exhibit N—(Continued)

Any motion picture film having titles or sound track in the Japanese language.

4.02. The Department Signal Officer, Headquarters Hawaiian Department, Fort Shafter, T. H., is hereby designated and directed to regulate and control the handling, custody, use and disposition of all Japanese motion picture film in the Territory of Hawaii, and shall have full power and authority to require the storage or destruction of any such film as he may deem necessary or advisable in the interests of military necessity.

4.03. Any person, firm, corporation or association having in possession any Japanese motion picture film shall forthwith file a descriptive report listing such film, giving such information as may be required. Such report shall be filed with said Department Signal Officer or his representatives. Such report need not be filed where a similar report has been submitted as required by prior Orders of the Military Governor.

4.04. Unless otherwise provided for by special agreement with the owner thereof, the procedure for receipts set forth in paragraphs 2.01 through 2.07 of this General Orders shall be followed for all Japanese motion picture film taken in by the Department Signal Officer.

5. Firearms and Weapons.

5.01. Firearms, ammunition, explosives and weapons in the possession of persons of Japanese ancestry, naturalized American citizens who were citizens of Germany or Italy, and American citizens

Exhibit N—(Continued)

whose parents were German or Italian citizens, will be turned in to the nearest police station immediately.

6. Pyrotechnics.

6.01. The possession or use by any person, firm, corporation, or association, of fireworks, roman candles, flares, torpedoes, pyrotechnics, or powder operated signalling devices of any kind, is hereby prohibited except as authorized by the Provost Marshal.

7. Penalty for Violations.

7.01. Any person, firm, or corporation who or which violates or evades, or attempts to violate or evade, any of the provisions of this General Orders, shall upon conviction thereof, be punished by confinement, with or without hard labor, for a period not to exceed one (1) year, or by a fine not to exceed One Thousand Dollars ($1,000.00), or by both such confinement and fine.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

10 March 1943

GENERAL ORDERS No. 12
Travel

1. Purpose.
2. Travel Control Bureau.
3. Priorities for Air Travel.
4. Enemy Aliens.

Exhibit N—(Continued)

5. Applications for Air Travel.
6. Military Aircraft—Quarantine Procedure.

1. Purpose.

1.01. This General Orders is issued in the interests of internal security as additional protection against possible espionage and sabotage.

2. Travel Control Bureau.

2.01. For the purpose of carrying out the provisions of Presidential Proclamations and Executive Orders; and the provisions of this General Orders, with respect to inter-island travel by enemy aliens, and for the purpose of controlling and regulating inter-island travel by air with a view to conservation of facilities for necessary and important traffic, a Travel Control Bureau hereby is established in each District.

2.02. The Travel Control Bureau in the City and County of Honolulu will function as a section of the Contact Office, Office of the Assistant Chief of Staff, G-2, Headquarters Hawaiian Department, and in each of the other Districts the Bureau will be under the control of the District Commander thereof.

On the Island of Kauai the Office of Military Intelligence shall function as the Travel Control Bureau, as designated by the Commanding General, Kauai District.

2.03. An officer from the Contact Office, Office of the Assistant Chief of Staff, G-2, Headquarters Hawaiian Department, will be detailed to the office of the Hawaiian Airlines, Limited, Honolulu, T.

Exhibit N—(Continued)

H., for the purpose of examining applications for such travel from the Island of Oahu.

On the Island of Kauai a representative from the Office of the Military Governor, Kauai Service Command, will be detailed to the Office of Kauai Terminals, Port Allen, Kauai, T. H., to examine applications for travel originating in the Kauai District.

The Commanding General, of each of the other military districts of the Territory, or officer designated by him, will examine applications for travel originating in their respective districts.

3. Priorities for Air Travel.

3.01. Transportation priorities shall be provided in the following order:

Military personnel (Army, Navy, Marine Corps and Coast Guard) travelling under official orders;

Army and Navy equipment, ammunition, supplies, and materials essential to the war effort ordered for air movement;

Personnel of government departments and agencies and personnel whose activities are essential to the war effort, other than military personnel, travelling on official business which is necessary to the successful prosecution of the war effort;

Persons other than those mentioned above travelling on business;

Other persons.

3.02. Clearing of space for passengers or cargo of higher priority classifications may require displacement of passengers in the last three classifications listed above.

Exhibit N—(Continued)

4. Enemy Aliens.

4.01. No enemy alien will be allowed to travel on any airplane, Governmental or commercial, except in cases of extreme emergency when such travel may be authorized by the Travel Control Bureau after proper precautions and safeguards have been taken. "Extreme emergency" is limited to persons dangerously ill or in need of medical treatment not available in their immediate location. When possible, such persons will be accompanied by a trusted physician, nurse, or attendant. In any event, when the travel of an enemy alien is allowed, the crew of the airplane will be so advised in order that they may be able to keep the passenger under close surveillance at all times.

5. Applications for Air Travel.

5.01. All persons requiring air transportation will report in person at the local office of the transportation company or other designated place and fill out the required application form. The travel control officer will pass on each application and grant the priority authorized. Tickets may be sold only after the application has been approved by the travel control officer. The office from which it is proposed to purchase transportation should be contacted as soon as possible.

5.02. All persons desiring to travel by airplane between the islands in the Territory of Hawaii must show reason and necessity for such travel and establish proof of their identity in submitting their application. Proof of citizenship must be fur-

Exhibit N—(Continued)

nished to the satisfaction of the travel control officer.

5.03. The application for travel will be submitted on the form prescribed by the Military Governor. The application will be made in quadruplicate. The following disposition of the application will be made:

The original—returned to applicant. If approved, it will be surrendered to the carrier at the time passage is purchased.

The duplicate—sent to the Contact Office, Office of the Assistant Chief of Staff, G-2, Headquarters Hawaiian Department, 214 Dillingham Building, Honolulu, T. H., at the close of each day.

The triplicate—sent to G-2, Office of the Commanding General of the District to which travel is to be made.

The quadruplicate—retained in office of the Travel Control Bureau for record.

5.04. All passengers travelling on priority will have their tickets stamped with the class of "Priority" at the time the ticket is purchased to insure proper handling at stopovers or return from other Districts.

5.05. Baggage and persons will be searched only when it is deemed advisable to make such search.

5.06. No written or printed matter in any language other than English will be taken aboard any commercial aircraft without prior approval by local Military Intelligence officials.

5.07. No maps, charts, or blueprints will be transported except by authorized persons.

Exhibit N—(Continued)

5.08. No photographs or negatives showing any of the beaches, shoreline, panoramic views from a high point, or military or naval installations will be transported. Under no circumstances will any (except official) undeveloped film be transported.

6. Military Aircraft—Quarantine Procedure.

6.01. The Local Director of the United States Public Health Service and the Plant Quarantine Inspector of the Department of Agriculture are relieved of their respective duties and responsibilities concerning disinsectization and plant inspection of military aircraft arriving at the Hawaiian Islands.

6.02. Two Medical Officers, a Quarantine Officer and an Assistant Quarantine Officer, designated by name by the Commanding General, Hawaiian Department, hereby are designated as Quarantine Officers for the quarantine inspection of military aircraft arriving from outside the Hawaiian Islands to include disinsectization and plant and animal quarantine inspection of these aircraft.

6.03. The Local Director of United States Public Health Service and the Plant Quarantine Inspector are designated as consultants to the Surgeon, Hickam Field, for these procedures.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

Exhibit N—(Continued)

10 March 1943

GENERAL ORDERS No. 13

Rescission of General Orders Nos. 1 to 181, Inclusive, Saving Clause, and Effective Date of General Orders Nos. 1 to 14, Inclusive, This Office, Dated 10 March 1943.

1. Rescission of General Orders Nos. 1 to 181, Inclusive, and Saving Clause.
2. Effective Date of General Orders Nos. 1 to 14, Inclusive, This Office, Dated 10 March 1943.

1. Rescission of General Orders Nos. 1 to 181, Inclusive, and Saving Clause.

1.01. General Orders Nos. 1 to 181, both inclusive, this office, bearing dates from December 7, 1941, to January 30, 1943, both dates inclusive, and all regulations issued pursuant to or under said General Orders, are rescinded as of March 10, 1943, provided, however, that the rescission of the aforesaid General Orders and regulations as herein provided shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred by any person or to which any person or property has become subject or liable, under such General Orders Nos. 1 to 181, inclusive, or said regulations, or any part, portion, or provision of said General Orders, or said regulations, prior to March 10, 1943, nor constitute a bar on or after March 10, 1943, to the filing or preferring of charges against persons for violations of said General Orders, said regulations, or any part of por-

Exhibit No. (Continued)

tion thereof committeed prior to March 10, 1943, or the trial and determination of such offenses or charges against such persons by the Provost Courts, Military Commissions, and the Military Governor of the Territory of Hawaii; and provided, further, that the said General Orders, said regulations, and parts, portions, and provisions thereof so rescinded shall be and remain in force on and after March 10, 1943, for the purpose of authorizing the prosecution, trial, conviction, and punishment of all persons who shall have violated said General Orders, or said regulations, as aforesaid, prior to March 10, 1943, and that every offender having committed an offense or violation against such General Orders, or said regulations, prior to March 10, 1943, shall be punished under the General Orders, regulations, parts, provisions, or porations thereof, in force when the offense or violation was committed.

2. Effective Date of General Orders Nos. 1 to 14, Inclusive, This Office, Dated 10 March 1943.

2.01. General Orders, Nos. 1 to 14, both inclusive, this office, each dated March 10, 1943, and of which series of General Orders this General Orders is one and is No. 13, shall be in full force and effect throughout the Territory of Hawaii on and after March 10, 1943.

By order of the Military Governor of the Territory of Hawaii:

THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

Exhibit N—(Continued)

10 March 1943

GENERAL ORDERS No. 14

Organization of the Office of the Military Governor

1. Executive Section.
2. District Representatives of the Military Governor.
3. Plans and Operations.
4. Central Identification Bureau.
5. Appointments.
6. Location of the Office of the Military Governor.

1. Executive Section.

1.01. Executive. The Executive and Assistant Executive of the Military Governor and others designated by them shall function on behalf of the Military Governor in carrying out the administration of all policies and operations of martial law and in coordinating and controlling all functions connected with such administration.

1.02 Law Enforcement. The military commissions, provost courts, and the Provost Court Commissioner will carry out the functions assigned to them in General Orders No. 2, this office, 10 March 1943, and amendments and additions thereto.

1.03. Legal Section. This section shall handle all matters with reference to military commissions and provost courts including review and appeal therefrom and recommendations to the Military Governor thereon, and shall render legal advice

Exhibit N—(Continued)

to the Military Governor and handle such other related matters as the Executive of the Military Governor may direct.

1.04. Public Information. Press releases and other information will be made available to the public by this section as ordered by the Military Governor.

1.05. Personnel. This section shall procure and administer the necessary personnel for the office operation of the Military Governor and perform such other related functions as directed.

1.06. Finance. This section shall handle all matters of finance connected with the office of the Military Governor and procure and administer supplies and equipment therefor.

1.07. Statistics and Engineering. This section shall handle all matters related to statistics and engineering referred to it by the Military Governor.

1.08. Trans-Pacific Travel. This section shall handle all matters concerning priorities of trans-Pacific travel and make recommendations to the Military Governor with reference thereto.

1.09. Military Property Comptroller. The Military Property Comptroller will carry out the functions set forth in Title 2. of General Orders No. 11, this office, 10 March 1943, and any amendments or additions thereto.

1.10. Internee and Evacuee Property Coordinator. The Internee and Evacuee Property Coordinator will carry out the functions set forth in Title 3. of General Orders No. 11, this office, 10

Exhibit Y—(Continued)

March 1943, and any amendments or additions thereto.

1.11. Hawaiian Department Alien Processing Center. The Hawaiian Department Alien Processing Center will handle all matters with reference to the interment or evacuation of persons in the Territory of Hawaii which are referred to it by the Military Governor.

2. District Representatives of the Military Governor.

2.01. The Commanding Generals of the Hawaii, Maui, Kauai, and Molokai-Lanai districts hereby are appointed Representatives of the Military Governor and hereby are charged with assisting in the administration and enforcement of the policies and orders of the Military Governor in their respective districts.

2.02. Representatives of the various sections and bureaus of the Office of the Military Governor will be appointed within the Districts of Hawaii, Maui, Kauai, and Molokai-Lanai as the situation may require. Such representatives shall be appointed by the Military Governor upon recommendation of the Commanding Generals of the respective districts acting as District Representatives of the Military Governor.

3. Plans and Operations.

3.01. Director of Plans and Operations. Under the direction of the Military Governor, the Director of Plans and Operations will make plans for, and control, coordinate, and supervise the activities

Exhibit N—(Continued)

of, such functional sections of the Office of the Military Governor as the Military Governor may direct and designate from time to time.

3.02. Director of Cargo and Passenger Control. In order to expedite the handling of all shipments at all Territorial ports, the Director of Cargo and Passenger Control is hereby directed to coordinate all port facilities.

3.03. Authority of Director of Cargo and Passenger Control. The Director of Cargo and Passenger Control will, to the extent directed by the Military Governor:

Supervise, coordinate and regulate dockage and stevedoring; barges, tugs, and floating equipment; the loading and discharging of fuel, including the use of fuel lines; transportation and other facilities necessary to expedite the handling of cargo and passengers; and the disposition of all cargo until removed from the dock area at all docks and wharves in the Port of Honolulu and in other Territorial ports;

Supervise, coordinate, and regulate, in accordance with priorities set by civilian agencies and transmitted to the Director of Cargo and Passenger Control by the Director of Plans and Operations, the allocation to vessels of all commercial cargo; and, in accordance with advice of the Army Transportation Corps, all Army cargo and vessels offered for shipment out of the Territory or between the islands;

Organize and set up an Assistant Director of

Exhibit N—(Continued)

Cargo and Passenger Control, together with such added personnel as the Military Governor may authorize, at each of the outlying ports of the Territory, to carry out the operations prescribed above.

3.04. Section of Labor Control. Under the direction of the Director of Labor Control, this section shall administer all matters pertaining to labor as promulgated by the Military Governor in General Orders No. 10, this office, 10 March, 1943, and any amendments or additions thereto.

3.05. Labor Control Board. A Labor Control Board hereby is created to investigate and arbitrate such labor disputes as may arise under the provisions of General Orders No. 10, this office, 10 March 1943, and any amendments or additions thereto, as well as such other labor disputes as may be referred to it by the Military Governor, and shall recommend to the Military Governor such labor policies as it shall deem advisable for the successful prosecution of the war effort.

This Labor Control Board shall consist of seven members as follows:

Director of Labor Control, Chairman

One (1) representative of the U. S. Army.

One (1) representative of the U. S. Navy

Two (2) representatives of the American Federation of Labor

One (1) representative of the Congress for Industrial Organization

One (1) representative of industry, appointed on recommendation of the Honolulu Chamber of Commerce.

Exhibit N—(Continued)

The decisions of this Labor Control Board shall not be final until approved by the Military Governor.

4. Central Identification Bureau.

4.01. The Central Identification Bureau will operate under a director appointed by the Military Governor and is charged with the registration of persons and the issuance of means of identification as required by the provisions of General Orders No. 8, this office, 10 March 1943, and any amendments or additions thereto.

5. Appointments.

5.01. The following appointments to the offices indicated hereby are made:

Major General James A. Woodruff, U.S.A., Director of the Central Identification Bureau;

Colonel B. F. Hayford, F. A., Director of Plans and Operations;

Commander Ernest Gray, U.S.N.R., Director of Cargo and Passenger Control;

Mr. John R. Mead, Director of Labor Control;

Mr. Alfred E. Tree, Military Property Comptroller;

Lieutenant Dwight H. Lowrey, Inf., Internee and Evacuee Property Coordinator.

5.02. The following officers are hereby designated District Military Property Comptrollers and also District Internee and Evacuee Property Coordinators in their respective districts:

Major William P. Crum, F.A., District of Kauai;

Major John D. Hagon, F.A., District of Maui;

Exhibit N—(Continued)

Major Thomas E. G. Paradine, Inf., District of Hawaii.

6. Location of the Office of the Military Governor.

6.01. The Office of the Military Governor of the Territory of Hawaii shall be located at Iolani Palace, Honolulu, T. H.

6.02. An Office of the Military Governor shall also be maintained in each district, including the Hawaii District, the Kauai District, the Maui District, and the Molokai-Lanai District, at such location as may be designated within the district by the Commanding General of each district acting as District Representative of the Military Governor.

By order of the Military Governor of the Territory of Hawaii.

THOMAS H. GREEN
Brigadier General A.U.S.
Executive

WILLIAM R. C. MORRISON
Colonel, J.A.G.D.
Assistant Executive

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

29 March 1943

General Orders No. 15.

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 7, This Office, 10 March 1943.
2. Amendment to General Orders No. 12, This Office, 10 March 1943.

1. Amendment to General Orders No. 7, This Office, 10 March 1943.

1.01. General Orders No. 7, this office, 10 March 1943, hereby is amended by adding thereto a new title and two new paragraphs to be respectively known as Title 15, General Orders No. 7, Office of the Military Governor, 10 March 1943, and Paragraphs 15.01 and 15.02, and to read as follows:

"15. Hilo Restricted Area.

"15.01. There hereby is created and established, in the interests of military necessity and public safety, a restricted military area on the Island of Hawaii, Territory of Hawaii, consisting of the area at Hilo, Hawaii, T. H., between the Wailuku River and the Wailoa River on the East (maki) side of Kamehameha Avenue, from the East (maki) side of Kamehameha Avenue to the shoreline at the said City of Hilo, Hawaii, T. H.

Exhibit N—(Continued)

"15.02. No person, firm, or corporation shall use or occupy, or authorize or permit any person to use or occupy said area or any part or portion thereof, or any room, apartment, house, or building in said restricted military area, for dwelling or residential purposes. No person shall reside or dwell within said restricted military area."

2. Amendment General Orders No. 12, This Office, 10 March 1943.

2.01. Paragraph 6.03, General Orders No. 12, this office, dated 10 March 1943, hereby is amended to read as follows: [82]

"6.03. The Local Director of the United States Public Health Service and the Plant Quarantine Inspector are designated as consultants to the Medical Officers, designated in Paragraph 6.02 above, for these procedures."

By order of the Military Governor of the Territory of Hawaii.

/S/ THOMAS H. GREEN
Brigadier General, A.U.S.
Executive

A True Copy:

ROBERT B. GRIFFITH
Captain, Infantry.

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

5 April 1943

General Orders No. 16.

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 3, This Office, 10 March 1943.
2. Amendment to General Orders No. 7, This Office, 10 March 1943.

1. Amendment to General Orders No. 3, This Office, 10 March 1943.

1.01. Paragraph numbered 2.04, Title 2, General Orders No. 3, this office, 10 March 1943, hereby is amended to read as follows:

"2.04. The following regulations are prescribed for the use of the lamp bulbs described in Paragraph numbered 2.03 immediately above.

"Only one such lamp bulb may be used in rooms having a floor area of one hundred (100) square feet or less.

"In rooms having a floor area of one hundred (100) square feet or more, and in corridors, one such lamp bulb may be used for each one hundred (100) square feet of such floor area and one additional lamp bulb of the kind aforesaid may be used for the fraction, if any, of floor area remaining, provided such fraction of floor area exceeds fifty (50) square feet.

Exhibit N—(Continued)

"When more than one such lamp bulb is used, the lamp bulbs shall be spaced at least five (5) feet apart.

"Such lamp bulbs shall be placed at least three (3) feet from any window, exterior door, or opening, and pointed toward the floor or ceiling.

"Such lamp bulbs shall not be pointed toward any window, exterior door, or other opening or a mirror. [83]

"These lamp bulbs in no case shall be used on the outside of buildings except with the approval of the Provost Marshal. Such lamp bulbs will not be used on lanais except with the written approval of the local Air Raid Warden. Such lamp bulbs when used with the approval of the said Provost Marshal or said Air Raid Warden will be used only in the manner authorized or approved by the said Provost Marshal or said Air Raid Warden, as the case may be.

"Every person, firm, or corporation using such a lamp bulb shall use said lamp bulb as provided herein and not otherwise."

2. Amendment to General Orders No. 7, This Office, 10 March 1943.

2.01. General Orders No. 7, this office, 10 March 1943, hereby is amended by adding thereto a new title and a new paragraph to be respectively known as Title 16, General Orders No. 7, Office of the Military Governor, 10 March 1943, and Paragraph 16.01, and to read as follows:

Exhibit N—(Continued)

"16. Punishing Persons Injuring or Tampering With Installations of the Armed Forces of the United States.

"16.01. No person shall, within the Territory of Hawaii cut, tear down, remove, handle, manipulate, interfere or tamper with, obstruct, trespass upon, or in any manner injure, damage, or destroy, any barbed wire fence, inclosure, obstruction, or entanglement, or any other military or naval fortification, emplacement, or installation of any form, kind, or type, erected or constructed, used, employed, or maintained by any of the Armed Forces of the United States for tactical purposes or for national security or defense, or in connection with the national defense or conduct of the war, wheresoever the same may be erected, constructed, or located, except on orders, or with the consent, of that authority of the Armed Forces of the United States controlling the said fence, inclosure, obstruction, entanglement, fortification, emplacement, or installation."

By order of the Military Governor of the Territory of Hawaii:

/S/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Assistant Executive

A True Copy:

ROBERT B. GRIFFITH
Captain, Infantry

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

6 April 1943

General Orders No. 17

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 1, This Office, 10 March 1943.

1.01. General Orders No. 1, this office, 10 March 1943, hereby is amended to read as follows:

"1. Executive.

"1.01. William R. C. Morrison, Colonel, J.A.G.D., hereby is appointed Executive of the Military Governor."

/S/ DELOS C. EMMONS
Lieutenant General, United States Army, Commanding General, Hawaiian Department, Military Governor of the Territory of Hawaii.

A True Copy:

ROBERT B. GRIFFITH
Captain, Infantry [84]

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

21 April 1943

General Orders No. 18

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 3, This Office, 10 March 1943.

1.01. Paragraph numbered 2.03, Title 2, General Orders No. 3, this office, 10 March 1943, hereby is amended to read as follows:

"2.03. Two types of lamp bulbs, hereinafter respectively referred to as Type I, which is the War Department Standard Blackout Light, and Type II, provided the same conform to the specifications or requirements hereinafter respectively prescribed for each of the aforesaid types of lamp bulbs, may be used in the controlled lighting authorized during the hours of blackout in Paragraph 2.02 above. The specifications or requirements prescribed for each type of said lamp bulbs are as follows:

The specifications or requirements prescribed for Type I of said lamp bulbs, being the War Department Standard Blackout Light, are as follows:

Watts—not more than 15 watts.

Volts—120 volts (lamp should be marked 115-125 volts).

Base—medium screw.

Exhibit N—(Continued)

Bulb—A15 Mazda, or equal, and internally frosted.

Bulb Coating—opaque except for curcular aperture on bulb end.

Circular Aperture—maximum diameter 1 inch. Aperture Color—orange or orange-red.

Opaque Coating Material—black and resistant to scratching or removal.

Approved bulbs—approved bulbs shall display a marking "Indoor Blackout—War Dept. Approved." [85]

"The specifications or requirements prescribed for Type II of said lamp bulbs are as follows:

Watts—not more than 25 watts.

Volts—220 to 240 volts to operate on 110 to 120-volt systems.

Base—medium screw.

Bulb—A19 Mazda or equal and internally frosted.

Bulb Coating—opaque except for circular aperture on bulb end.

Circular Aperture—maximum diameter 1 inch.

Opaque Coating Material—resistant to scratching or removal.

"Subject to the regulations hereinafter set forth in Paragraph numbered 2.04, during the hours of blackout lamp bulbs of Type I may be used indoors only, and lamp bulbs of Type II may be used either indoors or outdoors. No

Exhibit N—(Continued)

person, firm or corporation shall use a lamp bulb or lamp bulbs of Type I outdoors during the hours of blackout."

1.02. Paragraph numbered 2.04, Title 2, General Orders No. 3, this office, 10 March 1943, as amended by Paragraph numbered 1.01, Title 1, General Orders No. 16, this office, 5 April 1943, hereby is amended to read as follows:

"2.04. The following regulations are prescribed for the use indoors, during the hours of blackout, of lamp bulbs of Type I, and for the use, either indoors or outdoors, during the hours of blackout, of lamp bulbs of Type II, respectively described in Paragraph numbered 2.03 immediately above:

"Only one such lamp bulb, whether such lamp bulb be a lamp bulb of Type I or a lamp bulb of Type II, may be used in rooms having a floor area of one hundred (100) square feet or less.

"In rooms having a floor area of one hundred (100) square feet or more, and in corridors, one such lamp bulb may be used for each one hundred (100) square feet of such floor area and one such additional lamp bulb may be used for the fraction, if any, of floor area remaining, provided such fraction of floor area exceeds fifty (50) square feet.

"When more than one such lamp bulb is used indoors, the lamp bulbs shall be spaced at least five (5) feet apart.

Exhibit N—(Continued)

"Such lamp bulbs, when used indoors, shall be placed at least three (3) feet from any window, exterior door, or opening, and pointed toward the floor or ceiling.

"Such lamp bulbs, when used indoors, shall not be pointed toward any window, exterior door, or other opening or a mirror.

"Lamp bulbs of Type II may be used outdoors, provided that such lamp bulbs when so used are placed at least ten (10) feet apart and are pointed directly downward toward the floor or ground. Some outdoor uses suggested for said lamp bulbs of Type II, and permitted by the provisions of this paragraph, are the use thereof in or on arborways, exterior archways, doorways, galleries and vestibules, garages on residential property, gardens, lanais, loggias outside balconies, pathways, patios, porches, porticoes, roadways, terraces, verendas, walks, or yards. The aforesaid enumeration of suggested uses outdoors of said lamp bulbs of Type II is not intended to limit the use outdoors of said lamp bulbs to those uses specified above, but is only intended to give some examples of the outdoor uses that may be made of said lamp bulbs pursuant to the provisions of this paragraph.

"Every person, firm, or corporation, who or which during the hours of blackout uses such a lamp bulb, whether such lamp bulb be a lamp bulb of Type I or a lamp bulb of Type II, shall use said lamp bulb as provided herein and not otherwise."

Exhibit N—(Continued)

2. Amendment to General Orders No. 2, This Office, 10 March 1943.

2.01. Paragraph numbered 5.01, Title 5, General Orders No. 2, this office, 10 March 1943, hereby is amended to read as follows:

"5.01. Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly be brought before the court, [86] at the respective places as hereinafter designated, viz.:

At Hilo, Hawaii, T. H., and at such other places on the Island of Hawaii, T. H., as the particular Provost Court may direct.

Col. Arthur C. Huston, Jr., Inf.
Captain Frank W. Hustace, Jr., J.A.G.D.
1st Lt. Woolridge B. Morton, Jr., F.A.

At Honolulu and Kaneohe, Oahu, T. H.

Col. John H. Howard, U.S.A.
Lt. Col. Moe D. Baroff, Inf.
Major Eugene V. Slattery, J.A.G.D.
Captain John F. Wickem, J.A.G.D.

At Lihue, Kauai, T. H., and at such other places on the Island of Kauai, T. H., as the Provost Court may direct.

Lt. Col. Charles A. Fisher, Inf.

At Lanai City, Lanai, T. H., and at such other places on the Island of Lanai, T. H., as the Provost Court may direct.

Arthur W. Carlson.

Exhibit N—(Continued)

At Wailuku, Maui, T. H., and at such other places on the Island of Maui, T. H., as the Provost Court may direct.

Lt. Col. Merryl G. Shaver, J.A.G.D.

At Kaunakakai, Molokai, T. H., and at such other places on the Island of Molokai, T. H., as the Provost Court may direct.

Lt. Col. Merryl G. Shaver, J.A.G.D.

At Palmyra Island, T. H.

The Commanding Officer, United States Naval Air Station.

At Schofield Barracks and Pearl City, Oahu, T. H.

Lt. Col. Henry DuPree, Inf."

3. Amendment to General Orders No. 7, This Office, 10 March 1943.

3.01. Paragraph numbered 10.02, Title 10, General Orders No. 7, this office, 10 March 1943, hereby is amended to read as follows:

"10.02. All vessels except harbor craft (including tugs and barges) based at Honolulu, berthed in Honolulu Harbor at any pier not under lease to or owned by the Federal Government, shall be charged and shall pay to the Emergency Waterfront Fund an Emergency Waterfront Charge. Effective from 15 April 1943, the Emergency Waterfront Charge shall be three quarters of one cent ($0.0075) per net registered ton for each half-day or fraction thereof that the ship is at the dock. The

Exhibit N—(Continued)

periods from Noon to Midnight and from Midnight to Noon shall each constitute a half-day."

By order of the Military Governor of the Territory of Hawaii:

/S/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Captain, Infantry [87]

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

22 April 1943

General Orders No. 19

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 12, This Office, 10 March 1943.

1.01. General Orders No. 12, this office, 10 March 1943, hereby is amended by adding thereto a new title and eight new paragraphs to be respectively known as Title 7, General Orders No. 12, Office of the Military Governor, 10 March 1943, and Paragraphs 7.01-7.08, inclusive, and to read as follows:

"7. Trans-Pacific Travel Control Bureau.

"7.01. In furtherance of the internal security and in order to conserve and utilize with the greatest benefit facilities for necessary and

Exhibit N—(Continued)

important traffic, a Bureau hereby designated and to be known as the "Trans-Pacific Travel Control Bureau" hereby is created and established by the Military Governor of the Territory of Hawaii, to be located in Honolulu, T. H.

"Said Trans-Pacific Travel Control Bureau, hereinafter sometimes designated as the "said bureau," shall have as its function and purpose the regulation and control of all trans-Pacific travel from the Territory of Hawaii to destinations without the said Territory of Hawaii whether such travel be by surface transportation or air transportation. Said bureau shall be included within, and be deemed an agency of, the Office of the Military Governor within the meaning and for all the purposes of Title 9, General Orders No. 2, this office, 10 March 1943.

"7.02. The said Trans-Pacific Travel Control Bureau will function jointly under the Military Intelligence Division, the Office of the Naval Intelligence Division, and the Federal Bureau of Investigation. [88]

"7.03. The term "person" or "persons," as used in the subsequent paragraphs of this Title 7 shall not include, and is not intended to refer to, members of the armed forces of the United States or civilians traveling on official business for the Government of the United States unless such civilians so traveling on official business as aforesaid are carrying away or intend to

Exhibit N—(Continued)

carry away, or are believed by the said bureau to be carrying away or intending to carry away, from the Territory of Hawaii, contrary to federal statutes or in violation of the rules, regulations, or orders of the Military Governor of the Territory of Hawaii, or of the military or naval authorities or of other federal authorities, materials, documents, papers, or other matters.

"7.04. Persons applying for trans-Pacific surface transportation from the Territory of Hawaii to any destination without the Territory of Hawaii shall appear in person at The Port and Transportation Division, Hawaiian Department Service Forces, Castle & Cooke Building, Merchant Street, Honolulu, T. H., and make application for such surface transportation at such Port and Transportation Division. Application for trans-Pacific air transportation from the Territory of Hawaii to any destination without the Territory of Hawaii may be made by the person desiring such air transportation, by telephone to Pan-American Airways, Pearl Harbor, T. H., (Telephone No. Honolulu 86266.)

"7.05. Persons using or adopting or intending to use or adopt such trans-Pacific surface or air transportation shall comply with all the rules, regulations, and orders now or hereafter issued or promulgated by those federal agencies mentioned in Paragraph 7.02 of this Title 7 or by the said Trans-Pacific Travel Control

Exhibit N—(Continued)

Bureau to carry out the provisions of this Title 7. No person shall violate any of the said rules, regulations, or orders.

"7.06. The said Trans-Pacific Travel Control Bureau hereby is authorized and empowered, whenever said bureau deems it proper or necessary, to order or require any person intending or ready to board or enter any surface or air craft for the purpose of leaving or departing from the Territory of Hawaii to a destination without the Territory of Hawaii to first or prior to so boarding or entering such surface or air craft submit or offer for inspection by said bureau, its agents or representatives at a place designated by said bureau, any baggage, parcels, packages, or containers which such person may have in his possession and then intends transporting with him to any destination without the Territory of Hawaii. No such person, who shall have been so ordered or required by said bureau to so submit or offer any such baggage, parcels, packages and containers for inspection as aforesaid, shall board or enter any surface or air craft for the purpose of leaving or departing from the Territory of Hawaii to any destination without the Territory of Hawaii without first submitting for inspection to the duly authorized agents or representatives of said bureau his said baggage, parcels, packages, or containers which such person has in his possession or under his

Exhibit N—(Continued)

control and then intends transporting with him to any destination without the Territory of Hawaii; nor shall any such person who has been so required or ordered to so submit or offer any such baggage, parcels, packages, and containers for inspection as aforesaid, be permitted or allowed to board or enter any surface or air craft, nor actually enter or board any such surface or air craft, for the purpose of so leaving or departing from the Territory of Hawaii unless the said baggage, parcels, packages, and other containers first shall have been inspected by the duly authorized agents or representatives of said bureau. The United States Customs Service and the United States Coast Guard hereby are designated as the agencies to conduct the inspections contemplated in this paragraph.

"7.07. No person shall leave or depart, or attempt to leave or depart, by means of trans-Pacific surface or air transportation, from the Territory of Hawaii to any destination without the said Territory of Hawaii, without first obtaining written permission to do so from the said Trans-Pacific Travel Control Bureau, or from the Military Governor of the Territory of Hawaii, or without complying with, or except as authorized by, the provisions of this Title 7.

"7.08. No person shall obtain or use, or attempt to obtain or use, any trans-Pacific sur-

Exhibit N—(Continued)

face or air transportation from the Territory of Hawaii to a destination without the said Territory of Hawaii [89] without complying with, or except as authorized by, the provisions of this Title 7."

By order of the Military Governor of the Territory of Hawaii:

/S/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Captain, Infantry

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

26 April 1943

General Orders No. 20.

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 10, This Office, 10 March 1943.

1.01. Paragraph numbered 5.03, Title 5, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate for overtime in excess of forty-four (44) hours per

Exhibit N—(Continued).

week, or in excess of eight (8) hours in any one day. Where, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work-week a premium wage of double time compensation shall be paid for work on the seventh day. One and one-half regular rate will be paid for work performed on any of the following days only: New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day."

By order of the Military Governor of the Territory of Hawaii.

/S/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Captain, Infantry [90]

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

3 May 1943

General Orders No. 21.

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 2, This Office, 10 March 1943.

1.01. Paragraph numbered 5.01, Title 5, General

Exhibit N—(Continued)

Orders No. 2, this office, 10 March 1943, as amended by Paragraph numbered 2.01, Title 2, General Orders No. 18, this office, 21 April 1943, hereby is amended to read as follows:

"5.01. Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly be brought before the court, at the respective places as hereinafter designated, viz.:

At Hilo, Hawaii, T. H., and at such other places on the Island of Hawaii, T. H., as the particular Provost Court may direct.

Col. Arthur C. Huston, Jr., Inf.
Captain Frank W. Hustace, Jr., J.A.G.D.
1st Lt. Woolridge B. Morton, Jr., F.A.

At Honolulu and Kaneohe, Oahu, T. H.

Col. John H. Howard, U.S.A.
Lt Col. Moe D. Baroff, Inf.
Major Eugene V. Slattery, J.A.G.D.
Captain Edward N. Sylva, J.A.G.D.
Captain John F. Wiekem, J.A.G.D.

At Lihue, Kauai, T. H., and at such other places on the Island of Kauai, T. H., as the Provost Court may direct.

Lt. Col. Charles A. Fisher, Inf. [91]

At Lanai City, Lanai, T. H., and at such other places on the Island of Lanai, T. H., as the Provost Court may direct.

Arthur W. Carlson.

Exhibit N—(Continued)

At Wailuku, Maui, T. H., and at such other places on the Island of Maui, T. H., as the Provost Court may direct.

Lt. Col Merryl C. Shaver, J.A.G.D.

At Kaunakakai, Molokai, T. H., and at such other places on the Island of Molokai, T. H., as the Provost Court may direct.

Lt. Col. Merryl C. Shaver, J.A.G.D.

At Palmyra Island, T. H.

The Commanding Officer, United States Naval Air Station.

At Schofield Barracks and Pearl City, Oahu, T. H.

Lt. Col. Henry DuPree, Inf."

By order of the Military Governor of the Territory of Hawaii:

/S/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Captain, Infantry.

Exhibit N—(Continued)
Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

10 May 1943

General Orders)
No. 22)

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 8, This Offiee, 10 March 1943.

1.01. Paragraph numbered 5.01, Title 5, General Orders No. 8, this office, 10 March 1943, hereby is amended to read as follows:

"5.01. Any person engaged in the handling of explosives on wharves or harbor installations or engaged in the transportation of such explosives from place to place will obtain a special red identification badge from the Central Identification Bureau. This badge will be issued to trained explosive handlers on the approval of the Captain of the Port and only to persons entitled to unrestricted (white) badges. For admission to restricted waterfront areas this badge will have the same status as a white (unrestricted) waterfront identification badge."

1.02. Paragraph numbered 5.02, Title 5, General Orders No. 8, this office, 10 March 1943, hereby is amended to read as follows:

"5.02. Any employee to whom a red identifi-

Exhibit N—(Continued)

cation badge such as that mentioned in Paragraph numbered 5.01 above has been issued shall return the said badge to the Central Identification Bureau within forty-eight (48) hours after the separation of the said employee from the service of the employer engaged in handling and transporting such explosives by whom the said employee was employed at the time of such separation. Absence of such an employee from his employment for three (3) consecutive days without leave of absence authorized by his employer will be deemed separation from such service. Upon separation of such an employee from his employment, the red [92] identification badge issued to said employee shall become null and void forthwith and the person covered by it is not authorized thereafter to use it for any purpose whatsoever. If such an employee is re-employed, the old red identification badge must be surrendered to the Central Identification Bureau and a new one must be obtained. In the event such an employee who separates himself from the service of his employer does not return the said red identification badge to the Central Identification Bureau within forty-eight (48) hours after his separation from the service of his said employer, the said employer shall within a period of seventy-two (72) hours thereafter obtain the said identification badge from the said employee and return said badge to the Central Identification Bureau. In the event the said identification

Exhibit N—(Continued)

Paragraph numbered 2.15, the term "source of light," shall include and hereby is defined to mean, (1) any glass inclosed filament, gas mantle, fluorescent or neon tube, arc light, or other light generating element, actually operating on an electric circuit or by illuminating gas, open flame, or otherwise, together with all inclosing or translucent material, or (2) the bright or reflecting portion of any reflector, lens, mirror, or luminaire, which is or can be used, or operates, to control or diffuse light, and the term "light" shall include, and hereby is defined to mean, any light or illumination produced, caused, generated, transmitted, or diffused by a source of light as herein defined. The term "source of light," or "light," as used in said Paragraphs numbered 2.16 and 2.17 shall not be construed to include the lamp bulbs to which reference is made in Paragraphs numbered 2.02, 2.03, and 2.04, as amended, General Orders No. 3, this office, 10 March 1943; nor shall anything contained in this paragraph numbered 2.15 or in said paragraphs numbered 2.16 and 2.17 be construed to repeal, rescind, or expressly or impliedly amend or be applicable in any way to, any part, portion, or provision of Paragraphs numbered 1.01, 1.02, 2.02 to 2.14, inclusive, or 3.01 to 3.13, inclusive, General Orders No. 3, this office, 10 March 1943. [98]

"2.16. Any person, firm, or corporation may use or operate a source of light or more than

Exhibit N—(Continued)

one source of light, or display a light or lights, within a building, whether or not such building be used as a dwelling house or for business, professional, social, or recreational purposes, until, but not later than ten o'clock P.M., during the hours of blackout prescribed for the place or military district within which such source of light is used or operated or said light or lights are displayed, although such source of light or said light or lights are visible from the outside of the said building in which the same are used, operated, or displayed, and regardless of the amount or degree of illumination thereof, provided that such source of light or said light or lights being so used until, but not later than, ten o'clock P.M. during the said hours of blackout are not then visible from the sea, and, provided that at said time the curtains or shades are down to the lowest source of light causing said lights, or that the source of light is so placed in the building that no part of the said source of light above the lowest level of said source of light is visible above the horizontal during the said hours of blackout outside the building in which the said source of light is used, operated, or displayed. No person, firm, or corporation shall, within a building in the Territory of Hawaii, use or operate a source of light or display a light or lights between the commencement of the hours of blackout and ten o'clock P.M. which are visible in whole or

Exhibit N—(Continued)

badge is not so returned to the Central Identification Bureau by the said employee or obtained by the said employer from the said employee as herein required, a report of the failure or inability of the said employer to so obtain the said identification badge will be submitted to the Central Identification Bureau by the said employer within ten (10) days after the date of the separation of the said employee from the said service of said employer."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A true copy:

ROBERT B. GRIFFITH
Major, Infantry

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

11 June 1943

General Orders)
No. 23)

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 14, This Office, 10 March 1943.

1.01. Paragraph numbered 5.02, Title 5, General

Exhibit N—(Continued)

Orders No. 14, this office, 10 March 1943, hereby is amended to read as follows:

"5.02. The following officers are hereby designated District Military Property Comptrollers and also District Internee and Evacuee Proper Coordinators in their respective districts:

Lt. Col. John W. Guerard, GSC, District of Molokai-Lanai;

Major William P. Crum, F.A., District of Kauai;

Major John D. Hagon, F.A., District of Maui;

Captain Harold P. Luscomb, Inf., District of Hawaii."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [93]

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

18 June 1943

General Orders)
No. 24)

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 10, This Office, 10 March 1943.

1.01. Paragraph numbered 4.01, Title 4, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"4.01. Revised Wage Schedule No. 9 (Third Re-issue), dated 16 June 1943 and effective at the beginning of the first pay roll period after 16 June 1943, hereby is designated as the standard wage scale for workers engaged in work on construction and other projects under the War Department or the Navy Department, and employees of such other employers as may be designated from time to time by the Military Governor. No persons seeking work or employed on construction or other projects under the War Department or the Navy Department, or with other employers designated by the Military Governor, shall be employed at a rate less than, or in excess of, the standard rate for the job as listed in said Revised Wage Schedule No. 9 (Third Reissue) as now established or

Exhibit N—(Continued)

as the same may be revised from time to time as approved by the Military Governor.".

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [94]

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

12 July 1943

General Orders)
No. 25)

1. Controlled Lighting Test.

1.01. Definitions. The term "period" or "test period," as used herein, shall include, and hereby is defined to mean, the period from July 13, 1943, to July 19, 1943, inclusive. The term "source of light," as used herein, shall include, and hereby is defined to mean, (1) any glass-inclosed filament, gas mantle, fluorescent or neon tube, arc light, or other light generating element operating on an electric circuit, by illuminating gas, open flame, or otherwise, together with all inclosing or transluscent material, or (2) the bright or reflecting portion of any reflector, lens, mirror, or luminaire which is or can be used, or operates, to control or diffuse light. The

Exhibit N—(Continued)

term "light" or "source of light," as used herein, shall not be construed to include the lamp bulbs described in paragraphs numbered 2.02, 2.03, and 2.04, as amended, General Orders No. 3, this office, 10 March 1943. The term "horizontal," as used herein, shall include, and hereby is defined to mean, the plane or line parallel with the horizon and level with the bottom or lower point of a source of light.

1.02. Any of the parts, portions, or provisions of General Orders No. 3, this office, 10 March 1943, as amended, in conflict with paragraphs numbered 1.01, 1.03, and 1.04, of this General Orders No. 25, hereby are suspended for the said period from July 13, 1943, to July 19, 1943, inclusive and shall not be in force and effect during said test period. Upon the expiration of the period of the suspension thereof, unless otherwise amended or rescinded, the aforesaid parts, portions, or provisions of said General Orders No. 3, as amended prior to the enactment of this General Orders No. 25, again shall be in full force and effect.

1.03. During the said test period lights, regardless of the amount of illumination thereof, that are visible from the outside of a dwelling house may be used in a room, in a doorway, or on a lanai of such dwelling house until, but not later than, ten o'clock P.M. during the hours of blackout, provided that said lights are not visible from the sea and provided, further, that curtains or shades are [95] down to the lowest level of the lowest source of light causing said lights. No person shall use or operate

Exhibit N—(Continued)

a source of light between the commencement of the hours of blackout and ten o'clock P.M. which is visible from the exterior of said dwelling house in whole or in part above the horizontal. A light or source of light is visible from the sea within the meaning of this General Orders if, from any angle or position at a lanai, door, window, or other opening, the light or source of light is visible from the sea or if the sea can from any direction or position be seen by a person standing on the lanai, or inside the door or window at which the light or source of light is being used.

1.04. No person shall, after ten o'clock P.M. during the hours of blackout, use or operate a source of light which is visible on the outside of the building, house, or other structure in which the same is being used or operated, other than a lamp bulb authorized by paragraphs numbered 2.02, 2.03, and 2.04, as amended, General Orders No. 3, this office, 10 March 1943.

1.05. The test period provided for in this General Orders shall be deemed experimental only, and no person shall be arrested or punished for a violation of paragraph 1.03 of this General Orders committed prior to ten o'clock P.M., unless said violation be willful and deliberate. In the event of an air raid alarm during said test period it is requested that no person use or operate any such source of light which is visible from the exterior of the dwelling house in which the same is being used or operated.

Exhibit N—(Continued)

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

18 July 1943

General Orders)
No. 26)

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 2, This Office, 10 March 1943.

1.01. Paragraph numbered 5.01, Title 5, General Orders No. 2, this office, 10 March 1943, as amended by Paragraph numbered 2.01, Title 2, General Orders No. 18, this office, 21 April 1943, and by Paragraph numbered 1.01, Title 1, General Orders No. 21, this office, 3 May 1943, hereby is amended to read as follows:

"5.01 Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly

Exhibit N—(Continued)

be brought before the court, at the respective places as hereinafter designated, viz.:

"At Hilo, Hawaii, T.H., and at such other places on the Island of Hawaii, T.H., as the particular Provost Court may direct.

"Col. Arthur C. Huston, Jr., Inf.
Captain Frank W. Hustace, Jr., J.A.G.D.
1st Lt. Woolridge B. Morton, Jr., F.A.

"At Honolulu and Kaneohe, Oahu, T.H.

"Col. John H. Howard, U.S.A.
Lt. Col. Moe D. Baroff, Inf.
Major Eugene V. Slattery, J.A.G.D.

"At Lihue, Kauai, T.H., and at such other places on the Island of Kauai, T.H., as the Provost Court may direct.

"Lt. Col. Charles A. Fisher, Inf. [96]

"At Lanai City, Lanai, T. H., and at such other places on the Island of Lanai, T.H., as the Provost Court may direct.

"Arthur W. Carlson.

"At Wailuku, Maui, T.H., and at such other places on the Island of Maui, T.H., as the Provost Court may direct.

"Lt. Col. Merryl C. Shaver, J.A.G.D.

"At Kaunakakai, Molokai, T.H., and at such other places on the Island of Molokai, T.H., as the Provost Court may direct.

"Lt. Col. Merryl C. Shaver, J.A.G.D.

Exhibit N—(Continued)

"At Palmyra Island, T.H.

"The Commanding Officer, United States Naval Air Station.

"At Schofield Barracks and Pearl City, Oahu, T.H.

"Lt. Col. Henry DuPree, Inf."

1.02. Title 5, General Orders No. 2, this office, 10 March 1943, hereby is amended by adding thereto a new paragraph to be known as Paragraph 5.02, Title 5, General Orders No. 2, Office of the Military Governor, 10 March 1943, and to read as follows:

"5.02 Captain John F. Wickhem, J.A.G.D., hereby is appointed as a Provost Court and assigned to duty as such a Provost Court in addition to his other duties, for the trial of such persons as may properly be brought before the said Provost Court, and shall sit as said Provost Court at such times and places within the Territory of Hawaii as the Military Governor of the Territory of Hawaii may from time to time direct."

1.03. Paragraph numbered 6.03, Title 6, General Orders No. 2, this office, 10 March 1943, hereby is amended to read as follows:

"6.03. John F. Wickhem, Captain, J.A.G.D., hereby is appointed the Provost Court Commissioner for the Territory of Hawaii and assigned to duty as such Provost Court Commissioner in addition to his other duties."

Exhibit N—(Continued)

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [97]

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

19 July 1943

General Orders)
No. 27)

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 3, This Office, 10 March 1943.

1.01. General Orders No. 25, this office 12 July 1943, hereby is rescinded.

1.02. Title 2, General Orders No. 3, this office, 10 March 1943, hereby is amended by adding thereto three (3) paragraphs to be numbered and known as Paragraphs 2.15, 2.16, and 2.17, Title 2, General Orders No. 3, Office of the Military Governor, 10 March 1943, and to read as follows:

"2.15. As used in Paragraphs numbered 2.16 and 2.17, General Orders No. 3, Office of the Military Governor, 10 March 1943, being the two paragraphs immediately following this

Exhibit N—(Continued)

in part above the horizontal from the exterior of said building.

"2.17. No person, firm, or corporation shall, after ten o'clock P.M. during the hours of blackout, use or operate within a building a source of light which is visible from the outside of the said building, other than a lamp bulb authorized by Paragraphs numbered 2.02, 2.03, and 2.04, as amended, General Orders No. 3, this office, 10 March 1943; and no person, firm, or corporation shall, within the Territory of Hawaii, at any time during the hours of blackout, use or operate such a source of light outside a building."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

27 July 1943

General Orders)
No. 28)

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 8, This Office, 10 March 1943.

1.01 Title 8 and Paragraphs numbered 8.01, 8.02, 8.03, 8.04 and 8.05, General Orders No. 8, this office, 10 March 1943, hereby are rescinded.

2. Amendment to General Orders No. 14, This Office, 10 March 1943.

2.01. Paragraph numbered 5.02, Title 5, General Orders No. 14, this office, 10 March 1943, as amended by Paragraph numbered 1.01, Title 1, General Orders No. 23, this office, 11 June 1943, hereby is amended to read as follows:

"5.02. The following officers are hereby designated District Military Property Comptrollers and also District Internee and Evacuee Property Coordinators in their respective districts:

Major William P. Crum, F.A., District of Kauai;

Major John D. Hagon, F.A., District of Maui;

Captain Harold P. Luscomb, Inf., District of Hawaii;

Exhibit N—(Continued)

1st Lt. Haskell A. Belew, C.M.P., District of Molokai-Lanai."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [99]

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

31 July 1943

General Orders)
No. 29)

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 9, This Office, 10 March 1943.

1.01. General Orders No. 9, this office, 10 March 1943, hereby is amended by adding thereto a new title and four new paragraphs to be respectively known as Title 12, General Orders No. 9, Office of the Military Governor, 10 March 1943, and Paragraphs 12.01, 12.02, 12.03 and 12.04, and to read as follows:

"12. Restrictions on Sending or Receiving Mail for Members of the Armed Forces of the United States and on Transmitting and Receiv-

Exhibit N—(Continued).

ing Communications by Radio, Cable, Inter-Island, Radiotelephone, or Trans-Pacific Telephone, for Members of the Said Armed Forces or for Merchant Seamen.

"12.01. No person, firm, or corporation shall, within the Territory of Hawaii, for or on behalf of or at the request, direction, or order of any member of the armed forces of the United States within the Territory of Hawaii, mail, deposit for mailing or delivery by mail, or attempt to mail, any card, letter, subscription to a newspaper, magazine, or other publication published or printed and published outside the Territory of Hawaii, any order or request for the entry of any such subscription, any communication of any kind or nature, or any parcel, package, publication, or other property of any kind, to any person, firm, corporation, or place outside the said Territory of Hawaii, regardless of whether or not such card, letter, subscription, order or request for the entry thereof, communication, parcel, package, publication, or other property be the property of the said member of the armed forces of the United States or of the person, firm, or corporation to whom mailed, or of the said person, firm, or corporation so mailing the same; nor shall any person, firm, or corporation receive any such property [100] within the Territory of Hawaii for the purpose of so mailing the same. The provisions of this Paragraph 12.01 shall not be applicable to any

Exhibit N—(Continued)

employee or representative of the United States Post Office Department or other federal agency or department who, within the scope and course of his official duties and employment, mails or receives for transmittal in the United States mail any cards, letters, subscriptions or orders or requests for the entry thereof, communications, parcels, packages, publications, or other property to which reference hereinabove is made; nor shall the provisions of this paragraph be applicable to any publisher of a newspaper, book, magazine, or other publication within the Territory of Hawaii who so mails, or so receives for such mailing, a newspaper, book, magazine, or other publication published by such publisher, provided the return address imprinted, stamped, or written on said publication or on the wrapper or container in which said publication is mailed is that of such publisher, and provided that nothing is written, printed, or shown in or on said publication or the wrapper, envelope, or container in which the said publication is mailed, that will indicate that the same was mailed, or received for mailing, for or on behalf of or at the request, direction, or order of any member of the armed forces of the United States.

"12.02. No person who is not a member of the armed forces of the United States, firm, or corporation shall, within the Territory of Hawaii, send or transmit, cause to be sent or trans-

Exhibit N—(Continued)

mitted, attempt to send or transmit, or receive for the purpose of transmitting, by wireless, radio, cable, telegraph, radiotelephone, or telephone to any point, place, or destination outside the Territory of Hawaii, or from any point, place or destination on an island within the Territory of Hawaii to a point, place, or destination on another island within the Territory of Hawaii, or leave, deliver to, or place with any wireless, radio, cable, telegraph radiotelephone, or telephone company for the purpose of having it so sent or so transmitted, any information, statement, message, or communication of any kind or nature, for or on behalf of or at the request, direction, or order of any member of the armed forces of the United States or of any merchant seaman within the Territory of Hawaii. No person, firm, or corporation shall receive within the Territory of Hawaii at the request, direction, or order of any member of the armed forces of the United States or of any merchant seaman any information, statement, message, or communication of any kind or nature which has been transmitted to such person, firm, or corporation, by wireless, radio, cable, telegraph, radiotelephone or telephone, from a place outside the Territory of Hawaii, or from a place on another island within the Territory of Hawaii other than the island on which such person, firm, or corporation is situated at the time that such information, state-

Exhibit N—(Continued)

ment, message or communication is received by said person, firm, or corporation. The provisions of this Paragraph 12.02 shall not be applicable to any member of the Signal Corps of the Army of the United States or of any similar department or agency in any of the other components of the armed forces of the United States, or to any wireless, radio, cable, telegraph, radiotelephone or telephone company with respect to any information, statement, or message transmitted by any such company in accordance with censorship regulations established by the armed forces or other censorship agencies of the United States; nor shall the provisions of this paragraph prohibit a bank within the Territory of Hawaii from providing for the delivery of money to, at, or within a place either within or outside the Territory of Hawaii, an established commercial florist within the Territory of Hawaii from providing for the delivery of flowers to, at, or within a place either within or outside the Territory of Hawaii, or an established candy dealer within the Territory of Hawaii from providing for delivery of candy to, at, or within a place either within or outside the Territory of Hawaii, for or on behalf of or at the request, direction, or order of any member of the armed forces of the United States or of any merchant seaman within the Territory of Hawaii, provided such member of said armed forces or said merchant seaman for or by whom

Exhibit N—(Continued)

the said money, flowers, or candy is so delivered is duly authorized by competent military, naval, or other federal authority to so deliver, or cause to be so delivered, said money, flowers, or candy.

"12.03. No person who is not a member of the armed forces of the United States, firm, or corporation shall, within the Territory of Hawaii, file or originate a radio or radiotelephone call to any other place, point or destination either within or outside the Territory of Hawaii, for the purpose of allowing or providing a means for a member of the armed forces of the United States to participate in the telephone call from the point of origin, or with the knowledge that a member of the armed forces of the United [101] States is going to participate in the call from the point of origin, or for the purpose of making contact with a member of the armed forces of the United States, other than the party called at the point of destination, or with the knowledge that a member of the armed forces of the United States other than the party called at the point of destination is going to participate in the call.

"12.04. No person other than a member of the armed forces of the United States shall mail any card, letter, parcel, package, publication, or property of any kind in a Post Office of the Army or Navy of the United States, or deposit for mailing in any such Post Office any card, letter, parcel, package, publication, or property

Exhibit N—(Continued)

of any kind, or in any manner use any such Post Office, unless first duly authorized to do so by competent military or naval authority."

1.02. General Orders No. 9, this office, 10 March 1943, hereby is amended by adding thereto a new title and three new paragraphs to be respectively known as Title 13, General Orders No. 9, Office of the Military Governor, 10 March 1943, and Paragraphs 13.01, 13.02, and 13.03, and to read as follows:

"13. Filing of Cable and Radio Messages by Merchant Seamen.

"13.01. In order to insure the security of vessels of the United States or of Allied Nations any merchant seaman on the Island of Oahu desiring to send a cable or radio message shall obtain approval for the filing of such cable or radio message at the office of the District Cable Censor, 1160 Bishop Street, Honolulu, T. H., and any merchant seaman on the Island of Molokai so desiring to send a cable or radio message shall obtain the necessary approval for the filing of such cable or radio message at the office of the field censor located at the local Service Command Headquarters, and any merchant seaman on the Islands of Hawaii, Maui, or Kauai desiring to send a cable or radio message shall obtain approval for the filing of such cable or radio message at the office of the field censor located at the main telephone exchange on the island on which such merchant seaman shall be at the time that he proposes to send

Exhibit N—(Continued)

such message. No merchant seaman shall file any cable or radio message directly with the office of any commercial cable or radio company, bank, or florist until approval to do so has been first obtained as herein required.

"13.02. The term "merchant seaman" or "merchant seamen" as used in this General Orders, or in any other General Orders of the Military Governor, shall include, and hereby is defined to mean, any of the following, to wit: Personnel (officers, crew members, and others) attached to, employed on, or on duty aboard vessels controlled by the United States or nations allied with it in the present world wide conflict, except Army and Navy personnel, who are governed by appropriate Army and Navy censorship regulations, and civilian or military personnel employed on or on duty aboard vessels of the Army Transport Service, who have already been directed to file cable and radio messages at an Army Post Office.

"13.03. Merchant seamen, except persons having a bona fide permanent residence in the Territory of Hawaii, shall not give or use any address (including an address in care of a bank or communications company) within the Territory of Hawaii for the receipt of mail or cable or radio communications."

Exhibit N—(Continued)

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [102]

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

13 August 1943

General Orders)
No. 30)

AMENDMENTS TO GENERAL ORDERS

No. 1. Amendment to General Orders No. 1, This Office, 10 March 1943.

1.01. General Orders No. 1, this office, 10 March 1943, as amended by Paragraph numbered 1.01, Title 1, General Orders No. 17, this office, 6 April 1943, hereby is amended by adding thereto a new title and a new paragraph to be respectively known as Title 2, General Orders No. 1, Office of the Military Governor, 10 March 1943, and Paragraph 2.01, and to read as follows:

"2. Executive to the Military Governor for Cargo and Passenger Control.

"2.01. Roy E. Blount, Colonel, Cavalry,

Exhibit N—(Continued)

hereby is appointed Executive to the Military Governor for Cargo and Passenger Control."

2. Amendments to General Orders No. 3, This Office, 10 March 1943.

2.01. Paragraph numbered 2.16, Title 2, General Orders No. 3, this office, 10 March 1943, hereby is amended to read as follows:

"2.16. Any person, firm, or corporation may use or operate a source of light or more than one source of light, or display a light or lights, within a building, whether or not such building be used as a dwelling house or for business, professional, social, or recreational purposes, during the hours of blackout prescribed for the place or military district within which such source of light is used or operated or said light or lights are displayed, except from 10 o'clock P.M. until five-thirty o'clock A.M., although such source of light or said light or lights are visible from the outside of the said building in which the same are used, [103] operated, or displayed, and regardless of the amount or degree of illumination thereof, provided that such source of light or said light or lights being so used during the hours of blackout, except from ten o'clock P.M. until five-thirty o'clock A.M., are not then visible from the sea, and, provided that at said time the curtains or shades are down to the lowest source of light causing said lights, or that the source of light is so placed in the building that no part of the said source of

Exhibit N—(Continued)

light above the lowest level of said source of light is visible above the horizontal during the said hours of blackout outside the building in which the said source of light is used, operated, or displayed. No person, firm, or corporation shall, within a building in the Territory of Hawaii, use or operate a source of light or display a light or lights between the commencement of the hours of blackout and ten o'clock P.M., or from five-thirty A.M. until the termination of the hours of blackout, which are visible in whole or in part above the horizontal from the exterior of said building."

2.02. Paragraph numbered 2.17, Title 2, General Orders, No. 3, this office, 10 March 1943, hereby is amended to read as follows:

"2.17. No person, firm, or corporation shall, from ten o'clock P.M. until five-thirty o'clock A.M., use or operate within a building a source of light which is visible from the outside of the said building, other than a lamp bulb authorized by Paragraphs numbered 2.02, 2.03, and 2.04, as amended, General Orders No. 3, this office, 10 March 1943; and no person, firm, or corporation shall, within the Territory of Hawaii, at any time during the hours of blackout, use or operate such a source of light outside a building."

3. Amendment to General Orders No. 12, This Office, 10 March 1943.

3.01. Paragraph numbered 7.04, Title 7, General

Exhibit N—(Continued)

Orders No. 42, this office, 10 March 1943, hereby is amended to read as follows:

"7.04. Persons applying for trans-Pacific surface transportation from the Territory of Hawaii to any destination without the Territory of Hawaii shall appear in person at the War Shipping Administration Passenger Section, Castle & Cooke Building, Merchant Street, Honolulu, T. H., and make application for such surface transportation at such War Shipping Administration Passenger Section. Application for trans-Pacific air transportation from the Territory of Hawaii to any destination without the Territory of Hawaii may be made by the person desiring such air transportation, by telephone to Pan-American Airways, Pearl Harbor, T. H., (Telephone No. Honolulu 86266.)"

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [104]

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

18 September 1943

General Orders)
No. 32)

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 2, This Office, 10 March 1943.

1.01. Paragraph numbered 5.01, Title 5, General Orders No. 2, this office, 10 March 1943, as amended by Paragraph numbered 2.01 Title 2, General Orders No. 18, this office, 21 April 1943, Paragraph numbered 1.01, Title 1, General Orders No. 21, this office, 3 May 1943, and Paragraph numbered 1.01, Title 1, General Orders No. 26, this office, 18 July 1943, hereby is amended to read as follows:

"5.01. Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly be brought before the court, at the respective places as hereinafter designated, viz.:

"At Hilo, Hawaii, T.H., and at such other places on the Island of Hawaii, T.H., as the particular Provost Court may direct.

"Col. Arthur C. Huston, Jr., Inf.
Captain Frank W. Hustace, Jr., J.A.G.D.
1st Lt. Woolridge B. Morton, Jr., F.A.

Exhibit N—(Continued)

"At Honolulu and Kaneohe, Oahu, T.H.

"Lt. Col. Eugene V. Slattery, J.A.G.D.

"At Lihue, Kauai, T.H., and at such other places on the Island of Kauai, T.H., as the Provost Court may direct.

"Lt. Col. Lewis H. Jones, J.A.G.D.

Lt. Col. J. M. Arvey, J.A.G.D. [105]

"At Lanai City, Lanai, T.H., and at such other places on the Island of Lanai, T.H., as the Provost Court may direct.

"Arthur W. Carlson.

"At Wailuku, Maui, T.H., and at such other places on the Island of Maui, T.H., as the Provost Court may direct.

"Lt. Col. Merryl C. Shaver, J.A.G.D.

"At Kaunakakai, Molokai, T.H., and at such other places on the Island of Molokai, T.H., as the Provost Court may direct.

"Lt. Col. Merryl C. Shaver, J.A.G.D.

"At Palmyra Island, T.H.

"The Commanding Officer, United States Naval Air Station.

"At Schofield Barracks and Pearl City, Oahu, T.H.

"Lt. Col. Henry DuPree, Inf."

Exhibit N—(Continued)

By Order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.
20 September 1943

General Orders)
No. 33)

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 8, This Office, 10 March 1943.

1.01. Paragraph numbered 3.05, Title 3, General Orders No. 8, this office, 10 March 1943, hereby is amended to read as follows:

"3.05. Employers desiring passes for employees to enter posts, camps, stations or other restricted areas under the Army Port and Service Command will submit such lists for approval to the Commanding Officer of the Army Port and Service Command. Employers desiring that their employees enter restricted posts or areas not under the jurisdiction of the Army Port and Service Command will submit such

Exhibit N—(Continued)

lists to the Commanding Officers of the posts or areas concerned. In each case such list should state the name of the employee, the duty performed, and the installations or area to which admittance is desired. The Commanding Officer, if he approves, will refer the request to the C.I.B. where the history of each individual will be examined. The required form of badge will be issued by the C.I.B. to those individuals whose credentials are acceptable."

1.02. Paragraph numbered 3.06, Title 3, General Orders No. 8, this office, 10 March 1943, hereby is amended to read as follows:

"3.06. The Commanding Officer of the Army Port and Service Command or the Commanding Officers of military establishments under other commands may at any time revoke [106] the authority to enter areas under their respective jurisdictions. In such event, the C.I.B. will recall the badge, or "Special" badge and identification card, and, if necessary, will issue a new identification card, omitting the post, establishment, or area to which authority to enter has been revoked."

Exhibit N—(Continued)

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.
28 September 1943

General Orders)
No. 34)

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 9, This Office, 10 March 1943.

1.01. General Orders No. 9, this office, 10 March 1943, hereby is amended by adding thereto a new title and two new paragraphs to be respectively numbered and known as Title 14, General Orders No. 9, Office of the Military Governor, 10 March 1943, and Paragraphs 14.01 and 14.02, Title 14, General Orders No. 9, Office of the Military Governor, 10 March 1943, and to read as follows:

"14. Censorship of Electrical Communications.

"14.01. All communications by cable, radio, telephone or other means of electrical transmis-

Exhibit N—(Continued)

sion entering or leaving the Territory of Hawaii, or passing between any of the islands of the Territory, or between the Territory and any vessel or aircraft, shall be censored under "U.S. Censorship Regulations" issued by the Director of Censorship or under such other rules and regulations as the Military Governor may have specified or may from time to time specify.

"1402. No person, firm, or corporation shall evade or attempt to evade the submission of any such communication to such censorship, or use or attempt to use any code or other device unauthorized by such censorship for the purpose of concealing from such censorship the intended meaning of any such communication, or for the purpose of transmitting any information whatever, or falsify any information for the purpose of concealing from such censorship the identity of any person who is a party to or is [107] referred to in any such communication, or violate or attempt to violate by any other means or in any other manner the rules and regulations of such censorship."

By Order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

Exhibit N—(Continued)
Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.
30 September 1943

General Orders)
No. 35)

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 4, This Office, 10 March 1943.

1.01. General Orders No. 4, this office, 10 March 1943, hereby is amended by adding thereto a new title and five new paragraphs to be respectively numbered and known as Title 8, General Orders No. 4, Office of the Military Governor, 10 March 1943, and Paragraphs 8.01, 8.02, 8.03, 8.04 and 8.05, Title 8, General Orders No. 4, Office of the Military Governor, 10 March 1943, and to read as follows:

"8. Vacating of Congested Business Area Upon Sounding of an Air Raid Alarm.

"8.01. Congested Business Area. The term "congested business area" as used in this General Orders, hereby is designated and declared to be all of that portion of the City and County of Honolulu, Territory of Hawaii, bounded by a line running from Kapalama Basin mauka along the ewa side of Kapalama Drainage Canal to the mauka side of Vineyard Street; thence waikiki along the mauka side of Vineyard Street to the intersection of Miller Street and Punchbowl Street; thence mauka

Exhibit N—(Continued)

along the ewa side of Miller Street to the mauka side of Captain Cook Avenue; thence waikiki along the mauka side of Captain Cook Avenue to the waikiki side of Kapiolani Street; thence makai along the waikiki side of Kapiolani Street to the intersection of Ward Avenue and King Street; thence makai along the waikiki side of Ward Avenue to Kewalo Basin; thence ewa along the shore line of the Island of Oahu to the place of beginning.

"8.02. Public Vehicles. All common carriers are permitted to operate within the congested business area until the said area is vacated or operation therein becomes impossible.

"8.03. Private and Unofficial Vehicles. Private and unofficial vehicles which are parked on the streets in the [108] congested business area will be driven by the owners or persons in charge thereof away from the aforesaid area as soon as possible after sounding of an air raid alarm. To avoid congestion it is desirable that private and unofficial vehicles in parking lots or garages be left in place. Private and unofficial vehicles will not enter the aforementioned area after the sounding of an air raid alarm until after the "all clear" signal is given.

"8.04. Pedestrians. No pedestrian, except on official business, will be permitted to enter the congested business area after the alarm has

Exhibit N—(Continued)

been sounded until the "all clear" signal has been given. Individuals in the congested business area, except key personnel authorized in Paragraph 8.05 below, who do not have official iduties to perform therein during an alarm will observe the following rules during the thirty (30) minute period after sounding of the alarm;

Proceed out of the said area, preferably in a mauka direction.

Pedestrians will not move makai except on blind roads or lanes where it is necessary to do so before proceeding mauka.

Pedestrians will have little, if any protection from or in most of the buildings within the aforementioned area. Every effort will be made to vacate the said area within thirty (30) minutes after an air raid alarm is sounded. Shelter in buildings or splinter-proof shelters built by the O. C. D. should be sought only when attack seems imminent. Whenever antiaircraft firing begins, all civilians not on official duty shall take the nearest shelter.

After termination of the first thirty (30) minute period traffic parallel to the waterfront shall be prohibited within the congested business area except to official vehicles, common carriers and individuals on official business.

"8.05. Certain key personnel necessary as fire wardens, to prevent looting, and to protect property will be allowed to remain on duty in

Exhibit N—(Continued)

business establishments within the said congested business area. Lists of such personnel will be forwarded to the Department Provost Marshal. Up-to-date lists of approved personnel will be kept on file by each such establishment."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [109]

—

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

5 October 1943

General Orders
No. 36

AMENDMENTS TO GENERAL ORDERS:

1. Amendments to General Orders No. 3, This Office, 10 March 1943.

1.01. Paragraph numbered 2.06, Title 2, General Orders No. 3, this office, 10 March 1943, hereby is amended to read as follows

"2.06. Businesses or Industries Engaged in War Effort or National Defense. No person,

Exhibit N—(Continued)

firm, or corporation who or which owns, operates, maintains, or is engaged in any business or industry producing essentials necessary to the war effort, or otherwise connected with the national defense, shall violate, refuse, fail, or neglect to comply with all of the provisions of any rules, regulations, or General Orders of the Military Governor of the Territory of Hawaii relating to, or pertaining to, blackout in the Territory of Hawaii, now in full force and effect or hereafter enacted or issued, unless permission first is obtained from the Office of the Military Governor of the Territory of Hawaii or the respective Representatives of the Military Governor of the Territory of Hawaii to so operate or maintain said business or industy without complying with any or all of the said provisions of said rules, regulations or General Orders, subject, however, to any conditions designated, established, or created by the Office of the Military Governor of the Territory of Hawaii or the said respective Representatives of the Military Governor of the Territory of Hawaii, except, that in no event, shall the said business or industry be operated in such a manner as to permit or allow any source [110] of light, or light, or lights, to be visible from the sea at any time during the hours of blackout."

1.02. Paragraphs numbered 2.07, 2.08, and 2.14,

Exhibit N—(Continued)

Title 2, General Orders No. 3, this office, 10 March 1943, hereby are rescinded.

1.03. Paragraphs numbered 3.01 to 3.16, inclusive, Title 3, General Orders No. 3, this office, 10 March 1943, hereby are amended to read as follows:

"3.01. No person shall drive or operate any motor vehicle during the hours of blackout unless said motor vehicle shall conform to the specifications as set forth in the following paragraphs of this title, except that United States Army motor vehicles equipped with standard United States Army blackout lights are not required to conform to said specifications.

"3.02. Headlight. Two (2) approved blackout driving headlights shall be used on each motor vehicle, except on motorcycles and motor scooters, which shall have but one (1). Such lamps shall have the necessary color design as described below, with a slot which emits white light for driving. This slot shall be covered by a metal hood. Except as shown in Paragraph 3.06 and 3.10 below, the mounting height of the headlights shall be not less than twenty-four (24) inches nor more than fifty-five (55) inches measured from road level to the bottom of the slot, and in no case higher than the top of the rim of the steering wheel. With the vehicle on level surface and carrying a capacity load, the unit shall be so adjusted that the bottom of

Exhibit No. (Continued)

the slot is horizontal and so aimed that the beam shall drop four (4) inches measured on a vertical screen ten (10) feet in front of the lamp and in no instances higher than fifty-one (51) inches from the road level. When mounted on motorcycles or motor scooters, the lamp shall be placed on the front as near the center as possible to the normal line of operator's vision and far enough forward to eliminate any objectionable reflection of light from any portion of the vehicle.

"The upper sector of the headlight shall be painted a red color of a brightness of 3 and not to exceed 3.5 foot-lamberts (this light shall be visible at a distance of one thousand (1,000) and not over one thousand five hundred (1,500) feet). The thickness of the red band at the center of the vertical axis shall be at least one and one-half (1½) inches and not to exceed two and one-half (2½) inches. Paint shall be sprayed on the lens instead of brushing, thus producing an even surface. The other portion of the headlight, with the exception of the white light slot, shall be painted black or lusterless olive drab.

"White Light Slot. Except as shown in Paragraphs 3.06 to 3.11 below the white light slot for all motor vehicles shall be not less than one-eighth (⅛) inch in width and shall not exceed three-eighths (⅜) inch in width and may extend across the face the entire length of the lens at right angles to the vertical axis of

Exhibit N—(Continued)

the headlight. The bottom of the white light slot shall be located three-fourths (¾) inch below the horizontal center line of the headlight lens and shall extend upwards not to exceed three-eighths (⅜) inch from that point.

"Metal Shield or Hood Over Slot. The metal shield or hood over the white light slot shall be of twenty (20) to twenty-eight (28) gauge sheet metal extending from side to side of the headlamp. The extended forward edge of the shield shall be parallel to and fixed at from 0" to 1/16" above the bottom line of the white light slot, and shall be tightly clamped to the outer rim of the headlamp. At the center of the vertical axis of light, the shield shall have an angle of from forty-five (45) to seventy (70) degrees from the vertical axis at the face of the lens and sloped downward so that the outer edge of the shield shall be at least one and three-quarters (1¾) inches and not more than two and one-half (2½) inches from the lens at the narrowest part of the shield. The outer edge of the shield shall be folded back approximately three-eighths (⅜) inch to provide stiffness for the shield. The ends of the shield shall be closed and extended sufficiently back into the lamp to provide a clip to hold the shield in position on the headlamp. The inner face of the shield, or face on the lens side, shall be made to fit snugly to the curvature of the lens. Due to various types of headlights now in use on vehicles, the curvature of

Exhibit N—(Continued)

the shield shall be cut to fit each individual type of lens. The shield edge, when in proper position, shall give the adjustment prescribed in Paragraph 3.02 supra. The shield shall be painted black or [111] lusterless olive drab on the exterior and interior surfaces. Suitable mastic shall be applied around the circumference of the lens at the junction of the glass with the retaining rim and between the inner face of the shield and headlight lens, to properly shield any light at these points.

"3.03. Combination Tail and Stop Lamp, Reflectors, and Additional Equipment. One (1) tail, or combination tail and stop, lamp shall be securely mounted on the extreme rear of the vehicle and as near the left side as is practicable with red color as described below and aimed straight to the rear, so that it shall be clearly visible to traffic approaching from the rear. Except as specified in Paragraph 3.10 below, such lamps shall be mounted not less than twenty (20) inches and not more than fifty (50) inches above the road level. When mounted on motorcycles or motor scooters this lamp shall be mounted on the rear fender. The tail light shall have a round circle not less than one-half. (½) inch, and not more than one (1) inch in diameter of red color as prescribed for headlights in paragraph 3.02 above. The remainder of the lens shall be painted black or lusterless olive drab.

Exhibit N—(Continued)

"An additional tail or combination tail and stop lamp as described hereinabove shall be securely mounted on the extreme rear of all motor vehicle combinations one hundred (100) inches or more in width as near the right side as is practicable, and at the same height and alignment as the left combination tail and stop lamp.

"Two approved red reflectors may be mounted on all oversized motor vehicles, as hereinabove described, on the extreme rear, and two (2) approved amber reflectors may be mounted on the extreme front, on each side, as low on the vehicles as practicable and in no case higher than thirty (30) inches above the road level.

"3.04. Instrument and Dashboard Lights, Interior and Exterior Lights. Instrument and dashboard lights may be used providing they are of low intensity and do not permit light to be reflected from the interior to the exterior of the vehicle. Interior lights to permit facilitation of passenger ingress and egress may be used only at the time the vehicle is not in motion. Except as authorized by this title of this General Orders, all other lights shall be removed or rendered inoperative.

"3.05. Testing of Lights. The intensity of brightness of red used on headlights and tail lights shall be tested by the brightness meter manufactured by the Western Electric Com-

Exhibit N—(Continued)

pany, by the gauge designed and tested by The Department Engineer, by the Official Headlight Testing Stations operated by the United States Army Ordnance Office, Central Pacific Area, or by other methods approved by the Office of the Military Governor. The size and location of the white light slot, relative to the metal shield, shall be tested by a suitable screen to insure that the headlights conform with specifications set forth herein. This adjustment shall be made by moving the entire headlamp or with the adjusting screws provided for headlight beam adjustment, but the shield position shall not be altered.

"3.06. Trucks of Over 3-ton Rated Capacity. All lights for trucks of over 3-ton rated capacity shall conform to specifications set forth herein, except that the white light slot of the headlights may be increased to one-half (½) inch in width.

"Vehicles in this category may have lights mounted at a height in excess of fifty-five (55) inches measured from the bottom of the slot to road level provided that visual cut-off at the top of the beam on a vertical screen ten (10) feet in front of lamp is at least four (4) inches below the bottom of the horizontal slot and in no case higher than fifty-three (53) inches from road level when the vehicle is carrying a capacity load.

Exhibit N—(Continued)

"3.07. Busses. All lights for busses will conform to specifications set forth herein except that the white light slot of the headlights may be increased to one-half (½) inch in width.

"The route markers on all busses shall be illuminated with a red light of low intensity.

"Interior dome lights of low intensity, approved by the Office of the Military Governor, may be used in each [112] bus, as well as separate red stop light indicators mounted on the rear of all passenger carrying busses. The red tail light need not conform to Paragraph 3.03 above providing a bulb of three (3) candle power or less is used.

"3.08. Fire Department Trucks. All lights on Fire Department trucks shall conform to specifications set forth herein, except that the white light slot of the headlights may be increased to one-half (½) inch in width.

"If needed, Fire Department trucks may use a hooded white spotlight when going to a fire during peaceful times, but when returning from a fire, only the headlights prescribed above will be used. In case of a blitz or other similar situation, no spotlight shall be used. The hood for the white spotlight shall encircle the circumference of the light and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

Exhibit N—(Continued)

"3.09. Ambulances. All lights of ambulances shall conform to specifications set forth herein except that the white light slot of the headlights may be increased to one-half (½) inch in width.

"When responding to emergency calls, ambulances may use a hooded white spotlight during peaceful times, if needed, but when returning to their stations only the headlights prescribed above shall be used. In case of a blitz or other similar situation, no spotlight shall be used. The hood shall encircle the circumference of the spotlight and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

"3.10. Lumber Carriers. Headlights on lumber carriers shall conform to specifications set forth herein, with the following exceptions:

"The white light slot on the headlights may be increased to one-half (½) inch in width.

"With the vehicle on level surface the headlights shall be so adjusted that the bottom of the slot is horizontal and so aimed that the visual cut-off at the top of the beam on a vertical screen thirty (30) feet in front of the lamp is not higher than fifty-three (53) inches from the road level.

"Lumber carriers may have one (1) hooded white spotlight on the front of the carrier, at the top and one (1) hooded spotlight on the

Exhibit N—(Continued)

rear left side, near the seat of the operator. In peaceful times, these spotlights may be used when carrying loads of unusual length (over thirty-five (35) feet), when loading and unloading, and when maneuvering the vehicle in unusually difficult places. In case of a blitz or other similar situation, no spotlight shall be used. The hood shall encircle the circumference on the spotlight and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

"3.11. Road Sweepers. All lights on road sweepers shall conform strictly to specifications set forth herein, except that the white light slot of the headlight may be increased to one-(½) inch in width.

"Road sweepers may be quipped with a hooded spotlight of low power for the purpose of defining the curb line of the road. In case of a blitz or other emergency situation, no spotlight shall be used. The hood shall encircle the circumference of the spotlight and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

"3.12. Police Cars. All lights of police cars shall conform strictly to specifications set forth herein, except that certain police vehicles so authorized by the Chief of Police may use, in addition to the authorized lights, the military

Exhibit N—(Continued)

type blackout driving light positioned on the left side of the vehicle.

"Police cars may be equipped with a hooded white spotlight, which may be used during peaceful times when responding to emergency calls or in other emergency situations. In case of a blitz or other similar situation, no spotlight shall be used. The hood shall encircle the circumference of the spotlight and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

[113]

"3.13. Oversized trucks and trailers now equipped with running marker lights may use such lights providing they are of low intensity and shed only sufficient illumination to outline the vehicles on which they are used.

"3.14. The owner of any motor vehicle, or any paint shop or garage which is equipped to paint and install shields and test headlights, so that they meet specifications set forth herein, is authorized to perform this work.

"3.15. Upon installation, adjustment, painting, or testing of motor vehicle blackout lights, the shop performing the work shall affix a gum sticker to the inside lower right corner of the windshield. If the installation, adjustment, or painting is performed by the owner of any motor vehicle, the same shall be tested by the Official Headlight Testing Stations operated by

Exhibit N—(Continued)

the United States Army Ordnance Office, Central Pacific Area, which shall affix the necessary gum sticker. The sticker shall be not more than one (1) inch wide by two and one-half (2½) inches long. The face of this sticker shall show that the lights have been tested and adjusted. The reverse of the sticker shall be filled in to indicate the date, organization and name of the individual performing the adjustment and test.

"3.16. No person, firm, or corporation shall install shields or paint headlights without performing, or causing to be performed, the proper test and adjustment to meet specifications set forth herein, nor shall any person tamper with the lens or shield of headlights after they have been adjusted, tested, inspected, and approved."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

6 October 1943

General Orders
No. 37

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 6, This Office, 10 March 1943.

1.01. Paragraph numbered 3.09, Title 3, General Orders No. 6, this office, 10 March 1943, hereby is rescinded.

2. Amendment to General Orders No. 2, This Office, 10 March 1943.

2.01. Paragraph number 5.01, Title 5, General Orders No. 2, this office, 10 March 1943, as amended, hereby is amended to read as follows:

"5.01. Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly be brought before the court, at the respective places as hereinafter designated, viz:

"At Hilo, Hawaii, T. H., and at such other places on the Island of Hawaii, T. H., as the particular Provost Court may direct.

"Col. Arthur C. Huston, Jr., Inf.
Captain Frank W. Hustace, Jr., J.A.G.D.
Captain Woolridge B. Morton, Jr., F.A.

Exhibit N—(Continued)

"At Honolulu and Kaneohe, Oahu, T. H.

"Lt. Col. Eugene V. Slattery, J.A.G.D.

[114]

"At Lihue, Kauai, T. H., and at such other places on the Island of Kauai, T. H., as the Provost Court may direct.

"Lt. Col. Lewis H. Jones, J.A.G.D.

Lt. Col. J. M. Arvey, J.A.G.D.

"At Lanai City, Lanai, T. H., and at such other places on the Island of Lanai, T. H., as the Provost Court may direct.

"Arthur W. Carlson.

"At Wailuku, Maui, T. H., and at such other places on the Island of Maui, T. H., as the Provost Court may direct.

"Captain Kenwood B. Rohrer, J.A.G.D.

"At Kaunakakai, Molokai, T. H., and at such other places on the Island of Molokai, T. H., as the Provost Court may direct.

"Captain Kenwood B. Rohrer, J.A.G.D.

"At Palmyra Island, T. H.

"The Commanding Officer, United States Naval Air Station.

"At Schofield Barracks and Pearl City, Oahu, T. H.

"Lt. Col. Henry DuPree, Inf."

3. Amendment to General Orders No. 14, This Office, 10 March 1943.

Exhibit N—(Continued)

3.01. Paragraph numbered 5.02, Title 5, General Orders No. 14, this office, 10 March 1943, as amended by Paragraph numbered 1.01, Title 1, General Orders No. 23, this office, 11 June 1943, and by Paragraph numbered 2.01, Title 2, General Orders No. 28, this office, 27 July 1943, hereby is amended to read as follows:

"5.02 The following officers are hereby designated District Military Property Comptrollers and also District Internee and Evacuee Property Coordinators in their respective districts:

"Lt. Col. William P. Crum, F.A., District of Kuai; Major John D. Hagon, F.A., District of Maui; Captain Harold P. Luscomb, Inf., District of Hawaii; 1st Lt. Haskell A. Belew, C.M.P., District of Molokai-Lanai."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [115]

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

27 October 1943

General Orders
No. 39

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 2, This Office, 10 March 1943.

1.01. Paragraph numbered 5.01, Title 5, General Orders No. 2, this office, 10 March 1943, as amended, hereby is amended to read as follows:

"5.01. Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly be brought before the court, at the respective places as hereinafter designated, viz.:

"At Hilo, Hawaii, T. H., and at such other places on the Island of Hawaii, T. H., as the particular Provost Court may direct.

"Col. Arthur C. Huston, Jr., Inf.
Captain Frank W. Hustace, Jr., J.A.G.D.
Captain Woolridge B. Morton, Jr., F. A.

"At Honolulu and Kaneohe, Oahu, T. H.

"Lt. Col. Eugene V. Slattery, J.A.G.D.

"At Kaneohe Naval Air Station, Oahu, T. H.

"Lt. David H. Klatt, United States Naval Reserve.

Exhibit N—(Continued)

"At Lihue, Kauai, T. H., and at such other places on the Island of Kauai, T. H., as the Provost Court may direct.

"Lt. Col. Lewis H. Jones, J.A.G.D.

Lt. Col. J. M. Arvey, J.A.G.D. [116]

"At Lanai City, Lanai, T. H., and at such other places on the Island of Lanai, T. H., as the Provost Court may direct.

"Arthur W. Carlson.

"At Wailuku, Maui, T. H., and at such other places on the Island of Maui, T. H., as the Provost Court may Direct.

"Captain Kenwood B. Rohrer, J.A.G.D.

"At Kaunakakai, Molokai, T. H., and at such other places on the Island of Molokai, T. H., as the Provost Court may direct.

"Captain Kenwood B. Rohrer, J.A.G.D.

"At Palmyra Island, T. H.

"The Commanding Officer, United States Naval Air Station.

"At Schofield Barracks and Pearl City, Oahu, T. H.

"Lt. Col. Henry DuPree, Inf.

"At United States Navy Yard, Pearl Harbor, Oahu, T. H.

"Lt. Comdr. Arthur L. Mundo, United States Navy."

Exhibit X—(Continued)

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

—

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.
1 November 1943

General Orders
No. 40

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 10, This Office, 10 March 1943.

1.01. Paragraph 1.01, Title 1, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"1.01. The following policies are announced for the information and guidance of employers employing the services of (a) employees of the United States under the War Department or the Navy Department; (b) workers employed on construction and other projects under the War Department or the Navy Department; (c) stevedores and other

Exhibit X—(Continued)

workers employed on docks and dock facilities; and (d) employees of public utilities. The same policies shall be equally applicable to employees of the above-mentioned employing agencies. Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938 or the Walsh Healey Public Contracts Act."

1.02. Paragraph numbered 2.01, Title 2, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"2.01. Any person now or hereafter employed by any of the employers to whom reference is made in Paragraph 1.01 and who ceases to be so employed, shall, within two (2) days after ceasing to be so employed, register or re-register at the nearest office of the U. S. Employment Service and shall not accept employment with any other employer in the Territory of Hawaii, regardless of whether such employer is or is not an employer described in Paragraph 1.01, until so directed by the U. S. Employment Service." [117]

1.03. Paragraph numbered 2.02, Title 2, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"2.02. Every employer described in Paragraph 1.01 shall notify the nearest office of the United States Employment Service on Form 14-E, Section of Labor Control, Office of the Military Governor, of any employee dropped

Exhibit N—(Continued)

from such employer's pay roll, within two (2) days thereafter."

1.04. Paragraph numbered 3.03, Title 3, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"3.03. No employer described in Paragraph 1.01 shall employ or offer to employ an individual formerly, now, or hereafter in the employment of other such employers, unless and until, such individual shall have presented to the employment agency a bona fide release, without prejudice, on Form 14-E, Section of Labor Control, Office of the Military Governor, from his last previous employer, or from the Director of Labor Control and evidence of referral on Form USES 508."

1.05. Paragraph numbered 4.01, Title 4, General Orders No. 10, this office, 10 March 1943, as amended by Paragraph numbered 1.01, General Orders No. 24, this office, 18 June 1943, hereby is amended to read as follows:

"4.01. Revised Wage Schedule No. 9, (Fourth Re-Issue), dated 1 November 1943, and effective at the beginning of the first pay roll period after 1 November 1943, hereby is designated as the standard wage scale, except as noted in Paragraph 4.03, for workers engaged in work on construction and other projects under the War Department or the Navy Department and employers of such other employees

Exhibit N—(Continued).

as may be designated from time to time by the Military Governor. No persons seeking work or employed on construction or other projects under the War Department or the Navy Department, or with other employers designated by the Military Governor, shall be employed at a rate less than, or in excess of, the standard rate for the job as listed in said Revised Wage Schedule No. 9, (Fourth Re-Issue), as now established or as the same may be revised from time to time as approved by the Military Governor."

1.06. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding to Title 4 of said General Orders No. 10 a new paragraph to be numbered and known as Paragraph 4.03, Title 4, General Orders No. 10, Office of the Military Governor, 10 March 1943, and to read as follows:

"4.03. The provisions of contracts, or extensions thereof, between individuals and employers engaged on construction or other projects under the War Department or the Navy Department, relative to wages shall not be abrogated without the written consent of the individual."

1.07. Paragraph numbered 5.03, Title 5, General Orders No. 10, this office, 10 March 1943, as amended by Paragraph numbered 1.01, Title 1, General Orders No. 20, this office, 26 April 1943, hereby is amended to read as follows:

Exhibit N—(Continued)

"5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate, for overtime in excess of forty (40) hours per week, or in excess of eight (8) hours in any one day, except as noted in Paragraphs 5.08 and 5.09. Where, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work-week, a premium wage of double time compensation shall be paid for work on the seventh day. One and one-half regular rate will be paid for work performed on any of the following days only: New Year's day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day."

1.08. Paragraph numbered 5.06, Title 5, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"5.06. For employees engaged on construction and other projects under the War Department or the Navy Department, work shall be so scheduled that all employees shall receive one (1) day off in seven (7). Sunday work per se shall not be considered overtime, and no overtime shall be paid for Sunday except when it is worked consecutively in excess of five (5) days." [118]

Exhibit N—(Continued)

1.09. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding to Title 5 of said General Orders No. 10, two new paragraphs to be respectively numbered and known as Paragraphs 5.08 and 5.09, Title 5, General Orders No. 10, Office of the Military Governor, 10 March 1943, and to read as follows:

"5.08. Persons employed on construction or other projects under the War Department or the Navy Department in connection with derricks, dredges, drill rigs and tugs shall be paid overtime on the basis of one and one-half times the regular rate of pay for hours worked in excess of eight (8) hours in any one day or hours in excess of forty-eight (48) hours per week.

"5.09. The provisions of contracts, or extensions thereof, between individuals and employers engaged on construction or other projects under the War Department or the Navy Department relative to hours of work and overtime shall not be abrogated without the written consent of the individual."

1.10. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding thereto a new title and two new paragraphs to be respectively numbered and known as Title 9, General Orders No. 10, Office of the Military Governor, 10 March 1943, and Paragraphs 9.01 and 9.02, Title 9, General Orders No. 10, Office of the Military Governor, 10 March 1943, and to read as follows:

"9. Subsistence and Quarters.

Exhibit N—(Continued)

"9.01. The provisions of contracts, or extensions thereof, between individuals and employers engaged on construction and other projects under the War Department or the Navy Department relative to subsistence and quarters shall not be abrogated without the written consent of the individual.

"9.02. The practice of furnishing free board and lodging, or cash payment in lieu thereof, to persons employed locally or on new contracts shall be discontinued effective 1 November 1943."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [119]

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

4 November 1943

General Orders
No. 41

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 7, This Office, 10 March 1943.

1.01. Paragraph numbered 8.01, Title 8, General Orders No. 7, this office, 10 March 1943, hereby is amended to read as follows:

"8.01. There is hereby created and established in the interests of military necessity and public safety, a restricted military area, consisting of the waterfront area of the City and County of Honolulu, Territory of Hawaii, described as follows:"

The waterfront area of Honolulu makai of the following Described Line: Commencing at the ewa mauka corner of Ala Moana and South Streets; thence ewa on Ala Moana Street to an iron fence on the ewa side of premises occupied by the Contractors, Pacific Naval Air Bases; thence along said fence to the makai side of Punchbowl Street; thence to the makai side of Halekauwila Street; thence ewa on Halekauwila Street to the ewa side of Fort Street; thence mauka on Fort Street to the makai side of North Queen Street; thence along

Exhibit N—(Continued)

Queen Street to the waikiki side of Awa Street; thence along Awa Street to the mauka end of Pier 18; thence makai along ewa side of Pier 18 to Pier 19; thence ewa along mauka side of buildings of Pier 19 and across railroad spur to a point ten (10) feet ewa of said railroad spur; thence mauka parallel to railroad spur to makai side of pavement; thence ewa along pavement to Pier 24; thence mauka in front of Oahu Railway and Land Company to Pacific Street; thence [120] along the makai side of Pacific Street; thence mauka across Pacific Street to Honolulu Gas Company, Ltd.; thence around the Honolulu Gas Company, Ltd.'s property; thence along the ewa side of Union Oil Company of California's plant to Hart Street; thence ewa on mauka side of Hart Street to the Kapalama Drainage Canal; thence ewa in a straight line from the waikiki side of the Kapalama Drainage Canal to the waikiki-makai intersection of Kanakanui Street and Libby Street; thence makai along the waikiki side of Libby Street to the waikiki-makai intersection of Libby Street and Auiki Street; thence ewa along the makai side of Auiki Street to the makai side of the Kalihi Receiving Station; thence makai to the Kalihi Channel."

1.02. Paragraph numbered 8.04, Title 8, General Orders No. 7, this office, 10 March 1943, hereby is amended to read as follows:

Exhibit N—(Continued)

"8.04. The employment of enemy aliens in the Restricted Area will be permitted only under conditions prescribed by the Commanding Officer, Army Port and Service Command."

1.03. Paragraph numbered 8.05, Title 8, General Orders No. 7, this office, 10 March 1943, hereby is amended to read as follows:

"8.05. Parking of motor vehicles at any place within the Restricted Area is prohibited, except as may be authorized by the Commanding Officer, Army Port and Service Command."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

Exhibit N—(Continued)
Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.
12 November 1943

General Orders
No. 42

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 9, This Office, 10 March 1943.

1.01. Paragraph numbered 12.02, Title 12, General Orders No. 9, this office, 10 March 1943, hereby is amended to read as follows:

"12.02. No person who is not a member of the armed forces of the United States, firm, or corporation shall, within the Territory of Hawaii, send or transmit, cause to be sent or transmitted, attempt to send or transmit, or receive for the purpose of transmitting, by wireless, radio, cable, telegraph, radiotelephone, or telephone to any point, place, or destination outside the Territory of Hawaii, or from any point, place, or destination on an island within the Territory of Hawaii to a point, place, or destination on another island within the Territory of Hawaii, or leave, deliver to, or place with any wireless, radio, cable, telegraph, radiotelephone, or telephone company for the purpose of having it so sent or so transmitted, any information, statement, message, or com-

Exhibit N—(Continued)

munication of any kind or nature, for or on behalf of or at the request, direction, or order of any member of the armed forces of the United States or of any merchant seaman within the Territory of Hawaii. No person, firm, or corporation shall receive within the Territory of Hawaii at the request, direction, or order of any member of the armed forces of the United States or of any merchant seaman any information, statement, message, or communication of any kind or nature which has been transmitted to such person, firm, or corporation, by wireless, radio, cable, telegraph, radiotelephone, or telephone, from a place outside the Territory of Hawaii, or from a place on another island within the Territory of Hawaii other than the [121] island on which such person, firm, or corporation is situated at the time that such information, statement, message or communication is received by said person, firm, or corporation. The provisions of this Paragraph 12.02 shall not be applicable to any member of the Signal Corps of the Army of the United States or of any similar department or agency in any of the other components of the armed forces of the United States, or to any wireless, radio, cable, telegraph, radiotelephone, or telephone company with respect to any information, statement, or message transmitted by any such company in accordance with censorship regulations established by the armed

Exhibit N—(Continued)

forces or other censorship agencies of the United States; nor shall the provisions of this paragraph prohibit a bank within the Territory of Hawaii from providing for the delivery of money to, at, or within a place either within or outside the Territory of Hawaii, for or on behalf of or at the request, direction, or order of any member of the armed forces of the United States or of any merchant seaman within the Territory of Hawaii, provided such member of said armed forces or said merchant seaman for or by whom the said money is so delivered is duly authorized by competent military, naval, or other federal authority to so deliver, or cause to be so delivered, said money."

1.02. Paragraph numbered 13.01, Title 13, General Orders No. 9, this office, 10 March 1943, hereby is amended to read as follows:

"13.01. In order to insure the security of vessels of the United States or of Allied Nations, any merchant seaman on the Island of Oahu desiring to send a cable or radio message shall obtain approval for the filing of such cable or radio message at the office of the District Cable Censor, 1160 Bishop Street, Honolulu, T. H., and any merchant seaman on the Island of Molokai so desiring to send a cable or radio message shall obtain the necessary approval for the filing of such cable or radio message at the office of the field censor located at

Exhibit N—(Continued)

the local Service Command Headquarters, and any merchant seaman on the Islands of Hawaii, Maui, or Kauai desiring to send a cable or radio message shall obtain approval for the filing of such cable or radio message at the office of the field censor located at the main telephone exchange on the island on which such merchant seaman shall be at the time that he proposes to send such message. No merchant seaman shall file any cable or radio message directly with the office of any commercial cable or radio company, or bank, until approval to do so has been first obtained as herein required."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [122]

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.
22 November 1943

General Orders
No. 43

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 2, This Office, 10 March 1943.

~~1.01.~~ Paragraph numbered 3.01, Title 3, General Orders No. 2, this office, 10 March 1943, hereby is amended to read as follows:

"3.01. Provost Courts and Military Commissions shall have jurisdiction and power, and hereby are authorized and empowered, to try and determine any case, matter, or proceeding involving any violation or violations by a civilian or civilians of the rules, regulations, proclamations, or orders of the Military or Naval authorities of the United States, or of the Military Governor of the Territory of Hawaii, or of the laws of war. Such Provost Courts or Military Commissions shall have jurisdiction and power, and hereby are authorized and empowered, to try and punish members of the Armed Forces of the United States for violations of General Orders No. 3, Office of the Military Governor, 10 March 1943, and for violations of any statute of the Territory

Exhibit N—(Continued)

of Hawaii, or of any ordinance, resolution, by-law, regulation, or rule of any city, city and county, county, or other municipal corporation or political subdivision of the Territory of Hawaii, or of any order, regulation, or rule of the Military or Naval authorities of the United States, or of the Military Governor of the Territory of Hawaii, regulating or relating to vehicular or pedestrian traffic; but such Provost Courts and Military Commissions shall have no jurisdiction and power to try and punish members of the Armed Forces of the United States for any violations or offenses other than violations of said General Orders No. 3, or such traffic offenses. The concurrent jurisdiction of the Armed Forces of the United States to court-martial or otherwise discipline commissioned or enlisted personnel of their respective services for violation of said General Orders No. 3 or for such traffic offenses is not withdrawn by anything herein contained. Such Provost Courts and Military Commissions, in addition to the power to impose upon or argainst any such person or persons, [123] either civilians or members of the said Armed Forces of the United States, charged or tried in any such case, matter, or proceeding, by such Provost Courts or Military Commissions, the penalties, forfeitures, and similar punishment otherwise authorized by the General Orders of the Military Governor, shall have power, and hereby

Exhibit N—(Continued)

are authorized and empowered, to punish any such person or persons committing such violation or violations, or offense or offenses, by fine or imprisonment with or without hard labor, or by both such fine and imprisonment, as may be ordered or provided in the General Orders of the Military Governor."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

—

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

22 November 1943

General Orders
No. 44

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 11, This Office, 10 March 1943.

1.01. Title 2, and Paragraph numbered 2.01, Title 2, General Orders No. 11, this office, 10 March 1943, hereby are amended to read as follows:

"2. Property Comptroller.

Exhibit N—(Continued).

"2.01. There hereby is created the Office of the Property Comptroller which shall be an agency of the Office of the Military Governor. The holder of said office will be appointed by the Military Governor and hereby is designated as the Property Comptroller of the Office of the Military Governor.

1.02. Paragraphs numbered 2.02, 2.03, 2.04, 2.05, 2.06, and 2.07, Title 2, General Orders No. 11, this office, 10 March 1943, hereby are rescinded.

1.03. General Orders No. 11, this office, 10 March 1943, hereby is amended by adding to Title 2 of said General Orders No. 11, four new paragraphs to be respectively numbered and known as Paragraphs 2.02, 2.03, 2.04 and 2.05, Title 2, General Orders No. 11, Office of the Military Governor, 10 March 1943, and to read as follows:

"2.02. The Property Comptroller hereby is directed to administer the policy of the Military Governor in regard to the security and settlement of property belonging to persons interned, evacuated or otherwise separated from their property by military order. [124]

"2.03. All plans for ~~action~~ whereby civilians are removed or separated from their property by military order will be cleared with the Property Comptroller before action is taken.

"2.04. In all instances of internment or evacuation by military order where reasonable property settlements cannot be immediately accomplished, or where it is felt that extraordinary

Exhibit N—(Continued)

loss will result from internment or evacuation, or where attempts are being made to exploit the fact of internment or evacuation, the Property Comptroller will be notified by any person or persons having an interest in such property.

"2.05. The Property Comptroller and his assistants are agents of the Military Governor only and regardless of certain administrative assistance provided by his office, the Property Comptroller and his assistants will not be held agents of, nor responsible to, any person separated or removed from his property by military order."

1.04. Title 3, and Paragraphs numbered 3.01, 3.02, 3.03, and 3.04, Title 3, General Orders No. 11, this office, 10 March 1943, hereby are rescinded.

1.05. General Orders No. 11, this office, 10 March 1943, hereby is amended by adding thereto a new title and six new paragraphs to be respectively numbered and known as Title 3, General Orders No. 11, Office of the Military Governor, 10 March 1943, and Paragraphs 3.01, 3.02, 3.03, 3.04, 3.05, and 3.06, Title 3, General Orders No. 11, Office of the Military Governor, 10 March 1943, and to read as follows:

"3. Impounded Property.

"3.01. All civilian and military components, except Provost Courts and Military Commissions, which have taken possession of, commandeered, confiscated, or otherwise received or shall hereafter take possession of, commandeer, confiscate or otherwise receive property of any

Exhibit N—(Continued)

kind or nature, pursuant to the General Orders issued by the Office of the Military Governor or the rules, regulations, proclamations or orders of other competent Military or Naval authorities of the United States, shall give receipt therefor in the following form:

.....

(Issuing Agency)
Honolulu, T. H.
No. .....
Date .....

This certifies that the undersigned has received from .....
(Name of Individual) (Address)
the following articles which were surrendered in accordance with military Orders:

.....

(Signature of Agent Receiving)

"3.02. The receipt shall contain adequate description of each item of property it covers, be made in duplicate, numbered, dated and signed by the Receiving Agent. The original of the receipt shall be issued to the owner of the property described thereon or the person from whom the property was received; the duplicate of the receipt shall contain the following additional statement which shall be signed by the owner or person surrendering the property:

Exhibit N—(Continued)

I hereby certify that the above is a complete list of articles which I have surrendered to the Agency indicated on this date.

.....

(Signature of Owner)

"3.03. Each civilian or military component which has received or shall receive property as in Paragraph [125] 3.01 above, shall prepare in triplicate a list of all such property showing each item received and the number of the receipt issued therefor. One copy of such list shall be delivered to the Military Depository having or to have actual possession of the property along with the property or as soon as possible thereafter if the property has already been delivered. One certified copy of such list shall be delivered by the Military Depository together with the duplicates of all receipts issued by the Agency concerned to the Property Comptroller. The Property Comptroller shall return all duplicate receipts to the Military Depository having actual possession of the property. Each item of property shall have attached thereto a tag or other identification mark showing the name of the owner and the number of the receipt issued therefor.

"3.04. Receipts shall be issued and lists made for all property taken since 7 December 1941. Where the owner is not known, such fact shall be certified by a Responsible Au-

Exhibit N—(Continued)

thority of the issuing Agency on the original and duplicate of the receipt. Every effort shall be made by Agencies receiving property in the first instance to locate the owner thereof and obtain his verification.

"3.05. After the property has been properly tagged, the duplicates of the receipts representing property in possession of each Military Depository shall be filed in numerical order and held by it. Each such Military Depository shall prepare and keep on file a complete inventory of all alien property held by it, in addition to the above mentioned list, and shall note on said inventory its estimate of the present value of each item thereon and the estimate of a qualified appraiser if available.

"3.06. It is the purpose of this procedure to establish accountability so that there will be available complete records for the settlement of all claims in connection with the property so taken, confiscated, commandeered, or otherwise received."

2. Amendments to General Orders No. 14, This Office, 10 March 1943.

2.01. Paragraph numbered 1.09, Title 1, General Orders No. 14, this office, 10 March 1943, hereby is amended to read as follows:

"1.09. Property Comptroller. The property Comptroller will carry out the functions set forth in Titles 2 and 3, of General Orders No.

Exhibit N—(Continued)

11, this office, 10 March 1943, and any amendments or additions thereto."

2.02. Paragraph numbered 1.10, Title 1, General Orders No. 14, this office, 10 March 1943, hereby is rescinded.

2.03. Paragraph numbered 5.01, Title 5, General Orders No. 14, this office, 10 March 1943, hereby is amended to read as follows:

"5.01. The following appointments to the offices indicated hereby are made:

"Commander Ernest Gray, U.S.N.R., Director of Cargo and Passenger Control;

Lt. Comdr. Eugene B. Connell, U.S.N.R., Director of the Central Identification Bureau;

Mr. John R. Mead, Director of Labor Control;

Captain Dwight H. Lowrey, F. A., Property Comptroller."

2.04. Paragraph numbered 5.02, Title 5, General Orders No. 14, this office, 10 March 1943, as amended, hereby is amended to read as follows:

"5.02. The following officers hereby are designated District Property Comptrollers in their respective districts:

"Lt. Col. William P. Crum, F.A., District of Kauai;

Major John D. Hagon, F.A., District of of Maui; [126]

Exhibit N—(Continued)

Captain Harold P. Luscomb; Inf., District of Hawaii;

1st Lt. Haskell A. Belew, C.M.P., District of Molokai-Lanai."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

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Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.
4 December 1943

General Orders
No. 45

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 6, This Office, 10 March 1943.

1.01. Paragraph numbered 1.01, Title 1, General Orders No. 6, this office, 10 March 1943, hereby is amended to read as follows:

"1.01. The term "enemy alien," "enemy aliens," "alien enemy," or "alien enemies," as used in this General Orders or in any other General Orders of the Military Governor, un-

Exhibit N—(Continued)

less the use thereof in such General Orders clearly indicates otherwise, shall include, and hereby is defined to mean, all natives, citizens, denizens, or subjects of Japan, Germany, or of any other nation or government hostile to the United States, who are within the Territory of Hawaii and not actually naturalized within the United States, provided, however, that the term "enemy alien," "enemy aliens," "alien enemy," or "alien enemies," as used in Paragraphs 4.01, 4.02, 4.03, 4.04, and 4.08, Title 4, and Paragraph 5.03, Title 5, General Orders No. 3, Office of the Military Governor, 10 March 1943, and as used in Paragraph 2.02, Title 2, General Orders No. 6, Office of the Military Governor, 10 March 1943, shall not include nor mean any Korean or any person of Korean ancestry or of Korean racial extraction."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [127]

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

19 December 1943

General Orders
No. 46

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 2, This Office, 10 March 1943.

1.01. Paragraph numbered 5.01, Title 5, General Orders No. 2, this office, 10 March 1943, as amended, hereby is amended to read as follows:

"5.01. Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly be brought before the court, at the respective places as hereinafter designated, viz.:

"At Hilo, Hawaii, T. H., and at such other places on the Island of Hawaii, T. H., as the particular Provost Court may direct.

"Col. Arthur C. Huston, Jr., Inf.
Captain Frank W. Hustace, Jr., J.A.G.D.

"At Honolulu and Kaneohe, Oahu, T. H.
"Lt. Col. Alfred F. Newkirk, A. C.
Lt. Col. Eugene V. Slattery, J.A.G.D.

"At Kaneohe Naval Air Station, Oahu, T. H.
"Lt. David H. Klatt, United States Naval Reserve.

Exhibit N—(Continued)

"At Lihue, Kauai, T. H., and at such other places on the Island of Kauai, T. H., as the Provost Court may direct.

"Lt. Col. Lewis H. Jones, J.A.G.D.

Lt. Col. J. M. Arvey, J.A.G.D. [128]

"At Lanai City, Lanai, T. H., and at such other places on the Island of Lanai, T. H., as the Provost Court may direct.

"Arthur W. Carlson.

"At Waïluku, Maui, T. H., and at such other places on the Island of Maui, T. H., as the Provost Court may direct.

"Captain Kenwood B. Rohrer, J.A.G.D.

"At Kaunakakai, Molokai, T. H., and at such other places on the Island of Molokai, T. H., as the Provost Court may direct.

"Captain Kenwood B. Rohrer, J.A.G.D.

"At Palmyra Island, T. H.

"The Commanding Officer, United States Naval Air Station.

"At Schofield Barracks and Pearl City, Oahu, T. H.

"Lt. Col. Henry DuPree, Inf.

"At United States Naval Yard, Pearl Harbor, Oahu, T. H.

"Lt. Comdr. Arthur L. Mundo, United States Navy."

Exhibit N—(Continued)

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

—

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

20 December 1943

General Orders
No. 47

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 3, This Office, 10 March 1943.

1.01. Title 1, and Paragraphs numbered 1.01 and 1.02, Title 1, Paragraphs numbered 2.01, 2.15, and 2.16, Title 2, Paragraphs numbered 3.01 and 3.07, Title 3, and Paragraphs numbered 4.01, 4.02, 4.03, 4.04, 4.05, and 4.06, Title 4, General Orders No. 3, this office, 10 March 1943, hereby are amended to read as follows:

"1. "Definitions."

"1.01. The term "hours of blackouts," "during the hours of blackout," "blackout," or similar language, as used in this General

Exhibit N—(Continued)

Orders or in any other General Orders of the Military Governor, unless the use thereof in such General Orders clearly indicates otherwise, shall include and hereby is defined to mean, that period of time between ten o'clock P. M. of one day and five-thirty o'clock A. M. of the following day.

"1.02. The term "hours of darkness" as used in this General Orders, or in any other General Orders of the Military Governor, unless the use thereof in such General Orders clearly indicates otherwise, shall include and hereby is defined to mean that period of time between one-half (½) hour after sunset and the commencement of the hours of blackout at ten o'clock P. M., and that period of time between five-thirty o'clock A. M. and one-half (½) hour before sunrise.

"2.01. Except as may other wise be authorized in this General Orders or in any other General Orders of the Military Governor, or except as otherwise first may be authorized by the Military Governor of the Territory of Hawaii, no person, firm, or corporation shall, at any time during the hours of darkness or during the hours of blackout, use or operate within a building a source of light which, or the light from which, is visible from the outside [129] of the said building, other than a lamp bulb authorized by Paragraphs numbered 2.02 and 2.03. Title 2, General Orders No. 3, this

Exhibit N—(Continued)

office, 10 March 1943, or use or operate a source of light outside a building.

"2.15. As used in this General Orders or in any other General Orders of the Military Governor, unless the use thereof in such General Orders clearly indicates otherwise, the term "source of light," shall include, and hereby is defined to mean, (1) any glass inclosed filament, gas mantle, fluorescent or neon tube, arc light, or other light generating element, actually operating on an electric circuit or by illuminating gas, open flame, or otherwise, together with all inclosing or translucent material, or (2) the bright or reflecting portion of any reflector, lens, mirror, or luminaire, which is or can be used, or operates, to control or diffuse light, and the term "light" shall include, and hereby is defined to mean, any light or illumination produced, caused, generated, transmitted, or diffused by a source of light as herein defined. Nothing contained in this Paragraph numbered 2.15 shall be construed to repeal, rescind, or expressly or impliedly amend or to be applicable in any way to any part, portion, or provision of Paragraphs numbered 2.02 to 2.05, inclusive, Title 2, General Orders No. 3, this office, 10 March 1943.

"2.16. Any person, firm, or corporation may use or operate a source of light or more than one source of light, or display a light or lights, until ten o'clock P. M., within a building, re-

Exhibit N—(Continued)

gardless of whether or not such building be used as a dwelling house, or for business, professional, social, or recreational purposes, and regardless of the amount of illumination thereof and the fact that the same may be visible from the outside of said building. Any person, firm, or corporation may also use or operate a source of light or more than one source of light or display a light or lights within such a building from five-thirty o'clock A. M. until one-half (½) hour before sunrise, although such source or sources of light or lights are visible from the outside of said building in which the same are used, operated, or displayed, and regardless of the amount or degree of illumination thereof, provided that such source of light or said light or lights being so used or displayed between five-thirty o'clock A. M. and one-half (½) hour before sunrise are not then visible from the sea. Any person, firm, or corporation may use or operate such a source or sources of light outdoors, or display such a light or lights outdoors, from the commencement of the hours of darkness until nine o'clock P. M., in order to furnish illumination for outdoor recreation facilities and events and for purposes other than such recreational facilities or events until ten o'clock P. M., provided that such source or sources of light are not visible above the horizontal and are not directly visible from

Exhibit N—(Continued)

the sea, and provided, further, that they are not used for ornamental purposes or for the purposes of advertising. Traffic signal lights and street lights shielded as the Military Governor may direct may be used at full strength at all times during the hours of blackout. Maximum lighting in the interior of busses and trains is authorized. No person, firm, or corporation shall use or operate outdoors during the hours of darkness or during the hours of blackout any source of light for ornamental or advertising purposes.

"3.01. No person shall drive or operate any motor vehicle during the hours of darkness or during the hours of blackout unless said motor vehicle shall conform to the specifications as set forth in the following paragraphs of this title, except that United States Army motor vehicles equipped with standard United States Army blackout lights are not required to conform to said specifications.

"3.07. Busses. All lights for busses will conform to specifications set forth herein except that the white light slot of the headlights may be increased to one-half (½) inch in width.

"The route markers on all busses shall be illuminated with a red light of low intensity.

"Separate red stop light indicators mounted on the rear of all passenger carrying busses may be used. The red tail lights need not con-

Exhibit N—(Continued)

form to Paragraph 3.03 above, providing a bulb or three (3) candle power or less is used.

[130]

"4.07. Except as is hereinafter authorized by Subparagraph 7, Paragraph 4.03, no enemy alien shall be present on the streets and highways, in parks, and on beaches, either on foot or in vehicles, during the hours of blackout.

"4.02. Except as is hereinafter authorized, no person shall be present on the streets and highways, in parks, and on beaches either on foot or in vehicles, during the hours of blackout.

"4.03. The following classes of persons are excepted from the restrictions of Paragraph 4.02 above:

Personnel of the Armed Forces of the United States and allied nations on duty or proceeding to and from duty;

Law enforcement officers on duty, and going to and from duty.

Civilian personnel required to be on the streets and highways during such hours because of their employment on defense work, by public utilities, in civilian defense activities, or by the government, or while proceeding directly to and from work;

Doctors on call;

Persons holding Police passes issued since December 7, 1941;

Persons holding special passes issued and

Exhibit N—(Continued)

approved by the Provost Marshal, Military Police, or Civilian Police; and

Enemy aliens transported in motor vehicles during the hours of blackout by drivers of non-enemy ancestry upon written approval of the Provost Marshal.

"4.04. No person may drive, operate, or ride as a passenger in, a motor vehicle on the streets and highways within the Territory of Hawaii, during the hours of blackout unless duly authorized to do so by or pursuant to the General Orders of the Military Governor or otherwise first authorized by the said Military Governor. No person authorized pursuant to this Paragraph numbered 4.04 shall drive a motor vehicle during the hours of blackout unless said motor vehicle shall conform with all blackout regulations of the Military Governor relating to equipment for and manner of operation of such motor vehicle.

"4.05. Twenty Miles Speed Limit. Except as authorized by the civil or military police, no person shall operate any vehicle at a rate of speed in excess of twenty (20) miles per hour during the hours of darkness or during the hours of blackout.

"4.06. No Parking. No person shall park any vehicle on any public thoroughfare, street, or highway, during the hours of darkness or during the hours of blackout."

Exhibit N—(Continued)

2. Rescission of Provisions of General Orders.

2.01. Paragraph numbered 2.17, Title 2, and Paragraphs numbered 5.03 and 5.05, Title 5, General Orders No. 3, this office, 10 March 1943, hereby are rescinded.

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [131]

—

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

12 January 1944

General Orders
No. 48

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 3, This Office, 10 March 1943.

1.01. Paragraph numbered 3.07, Title 3, General Orders No. 3, this office, 10 March 1943, hereby is amended to read as follows:

"3.07. Busses. All lights for busses will conform to the specifications set forth herein except that the portion of the lens of the headlights of

Exhibit N—(Continued)

busses below the metal shield or hood described in this General Orders need not be painted, provided, however, that the extended forward edge of the shield or hood of the headlights of such busses shall be parallel to and fixed at least eleven-sixteenths (11/16) of an inch below the horizontal center line of the headlight lens.

"The route markers on all busses shall be illuminated with a red light of low intensity.

"Separate red stop light indicators mounted on the rear of all passenger carrying busses may be used. The red tail lights need not conform to Paragraph 3.03 above, providing a bulb of three (3) candle power or less is used."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [132]

Exhibit N—(Continued)

Territory of Hawaii.
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

20 January 1944

General Orders
No. 49

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 2, This Office, 10 March 1943.

1.01. Paragraph numbered 5.01, Title 5, General Orders No. 2, this office, 10 March 1943, as amended, hereby is amended to read as follows:

"5.01. Each of the following persons hereby is appointed as a Provost Court, and assigned to duty as such in addition to his other duties, for the trial of such persons as may properly be brought before the court, at the respective places as hereinafter designated, viz.:

"At Hilo, Hawaii, T. H., and at such other places on the Island of Hawaii, T. H., as the particular Provost Court may direct.

"Col. Arthur C. Huston, Jr., Inf.
Captain Frank W. Hustace, Jr., J.A.G.D.

"At Honolulu and Kaneohe, Oahu, T. H.
"Lt. Col. Alfred F. Newkirk, A.C.
Lt. Col. Eugene V. Slattery, J.A.G.D.

"At Kaneohe Naval Air Station, Oahu, T. H.
"Lt. David H. Klatt, United States Naval Reserve.

Exhibit N—(Continued)

"At Lihue, Kauai, T. H., and at such other places on the Island of Kauai, T. H., as the Provost Court may direct.

"Lt. Col. Lewis H. Jones, J.A.G.D.

Lt. Col. J. M. Arvey, J.A.G.D. [133]

"At Lanai City, Lanai, T. H., and at such other places on the Island of Lanai, T. H., as the Provost Court may direct.

"Arthur W. Carlson.

"At Wailuku, Maui, T. H., and at such other places on the Island of Maui, T. H., as the Provost Court may direct.

"Captain Kenwood B. Rohrer, J.A.G.D.

"At Kaunakakai, Molokai, T. H., and at such other places on the Island of Molokai, T. H., as the Provost Court may direct.

"Captain Kenwood B. Rohrer, J.A.G.D.

"At Palmyra Island, T. H.

"The Commanding Officer, United States Naval Air Station.

"At Schofield Barracks and Pearl City, Oahu, T. H.

"Lt. Col. Henry DuPree, Inf.

"At United States Navy Yard, Pearl Harbor, Oahu, T. H.

"Lt. Col. James C. Bigler, United States Marine Corps.

Lt. Comdr. Arthur L. Mundo, United States Navy."

Exhibit N—(Continued)

By order of the Military Governor of the Territory of Hawaii:

s/ WM. R. C. MORRISON
Colonel, J.A.G.D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

—

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

24 January 1944

General Orders
No. 50

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 3, This Office, 10 Mareh 1943.

1.01. Paragraphs numbered 3.01, 3.02, 3.05, 3.06, 3.07, 3.08, 3.09, 3.10, 3.11, and 3.12, Title 3, General Orders No. 3, this office, 10 March 1943, hereby are amended to read as follows:

"3.01. No person shall drive or operate any motor vehicle at any time during the hours of darkness or during the hours of blackout unless headlights shall be installed, maintained, and used on said motor vehicle in conformity with the specifications and provisions set forth in the following paragraphs of this Title.

Exhibit N—(Continued)

"3.62. Headlights. When motor vehicles are driven at any time during the hours of darkness or during the hours of blackout, two (2) approved blackout driving headlights constructed, installed, and maintained as herein required, shall be used on each motor vehicle, except on motorcycles and motor scooters, which shall have but one (1) headlight. Such headlights shall have the necessary color design as described below. Each headlight shall be covered by a metal shield or hood as described below. The mounting height of said headlight shall be not less than twenty-four (24) inches nor more than fifty-five (55) inches measured from road level to the extended forward edge of the said shield or hood of the headlight, and in no case higher than the top of the rim of the steering wheel. With the vehicle on level surface and carrying a capacity load, the headlight unit shall be so adjusted that the extended forward edge of the shield or hood of the headlight of such vehicle shall be parallel to and fixed at at least eleven-sixteenths (11/16) inch below the horizontal center line [134] of the headlight lens and so aimed that the visual cutoff at the top of the beam on a vertical screen ten (10) feet in front of the headlight is at least four (4) inches below the extended forward edge of the shield or hood of the headlight of such vehicle and in no instance higher than fifty-one (51) inches from the road level.

Exhibit N—(Continued)

When mounted on motorcycles or motor scooters the headlight shall be placed on the front as near the center as possible to normal line of operator's vision and far enough forward to eliminate any objectionable reflection of light from any portion of the vehicle.

"All that portion of the headlight lens above the junction of the headlight lens with the shield or hood shall be painted black, or lusterless olive drab, except that where such upper portion of such headlight is now painted a deep red color, said color shall be of brightness of three (3) and not exceeding 3.5 foot lamberts, and said red colored paint may be retained until such time as repainting is necessary. Paint shall be sprayed on such upper portion of such headlight instead of brushing thus producing an even surface. The portion of the headlight lens of such vehicle below the junction of the headlight lens with the shield or hood described in this General Orders need not be painted.

"Metal Shield or Hood. The metal shield or hood over the headlight lens shall be twenty (20) to twenty-eight (28) gauge sheet metal, extending from side to side of the headlight. The extended forward edge of the shield or hood of such headlight shall be parallel to and fixed at at least eleven-sixteenths (11/16) inch below the horizontal center line of the head-

Exhibit N—(Continued)

light lens, and shall be tightly clamped to the outer rim of the headlight. At the center of the vertical axis of light, the shield or hood shal have an angle of from forty-five (45) to seventy (70) degrees from the vertical axis at the face of the headlight lens and sloped downward so that the outer edge of the shield or hood shall be at least one and three-quarters (1-¾) inches and not more than two and one-half (2-½) inches from the headlight lens at the narrowest part of the shield or hood. The outer edge of the shield or hood shall be folded back approximately three-eighths (⅜) inch to provide stiffness for the shield or hood. The ends of the shield or hood shall be closed and extended sufficiently back into the headlight to provide a clip to hold the shield or hood in position on the headlight. The inner face of the shield or hood, or face on the lens side, shall be made to fit snugly to the curvature of the lens. Due to the various types of headlights now in use on vehicles, the curvature of the shield or hood shall be cut to fit each individual type of headlight lens. The shield or hood edge, when in proper position, shall give the adjustment prescribed in Paragraph 3.02, supra. The shield or hood shall be painted black or lusterless olive drab on the exterior and interior surfaces. Suitable mastic shall be applied around the circumference of the headlight lens at the junction of the headlight

Exhibit N—(Continued)

lens with the retaining rim and between the outer face of the shield or hood and headlight lens, to properly shield any light at these points.

"3.05. Testing of Lights. The intensity of brightness of red used on headlights and tail lights shall conform to the specifications set forth in Paragraph 3.02, supra, and shall be tested by the brightness meter manufactured by the Weston Electric Company, by the gauge designed and tested by the Department Engineer, by the official headlight testing stations operated by the United States Army Ordnance Office, Central Pacific Area, or by other methods approved by the Office of the Military Governor. The direction of the beam of the headlight relative to the metal shield or hood, shall be tested by suitable screen to insure that the headlight conforms to specifications set forth herein. This adjustment shall be made by moving the entire headlight or with the adjusting screws provided for headlight beam adjustment, but the shield or hood portion shall not be altered.

"3.06. Trucks of Over 3-Ton Rated Capacity. All lights for trucks of over 3-Ton rated capacity shall conform to the specifications set forth herein, except that vehicles in this category may have lights mounted at a height in excess of fifty-five (55) inches measured from the road level to the extended forward edge of the shield or hood of the headlight, provided

Exhibit N—(Continued)

that visual cut-off at the top of the beam on a vertical screen ten (10) feet in front of headlight is at least four (4) inches below the extended forward edge of the shield of hood of the headlight of such vehicle, and in no instance higher than fifty-three (53) inches from the road level when the vehicle is carrying a capacity load. **[135]**

"3.07. Busses. All lights for busses shall conform to the specifications set forth herein.

"The route markers on all busses shall be illuminated with a red light of low intensity.

"Separate red stop light indicators mounted on the rear of all passenger carrying busses may be used. The red tail lights need not conform to Paragraph 3.03, supra, providing a bulb of three (3) candle power or less is used.

"3.08. Fire Department Trucks. All lights on Fire Department trucks shall conform to specifications set forth herein. If needed, Fire Department trucks may use a hooded white spotlight when going to a fire, but when returning from a fire, only the headlights prescribed above will be used, provided, however, that in the case of a blitz or other similar situation, no spotlight shall be used. The hood for the white spotlight shall encircle the circumference of the light and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

Exhibit N—(Continued)

"3.09. Ambulances. All lights on ambulances shall conform to specifications set forth herein. When responding to emergency calls, ambulances may use a hooded white spotlight, if needed, but when returning to their stations, only the headlights prescribed above shall be used, provided, however, that in case of a blitz or other similar situation, no spotlight shall be used. The hood shall encircle the circumference of the spotlight and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

"310. Lumber Carriers. Headlights on lumber carriers shall conform to specifications set forth herein. With the vehicle on level surface the headlights shall be so adjusted that the extended forward edge of the shield or hood of the headlight is horizontal and is so aimed that the visual cut-off at the top of the beam on a vertical screen thirty (30) feet in front of the headlight is not higher than fifty-three (53) inches from the road level when the vehicle is carrying a capacity load.

"Lumber carriers may have one (1) hooded white spotlight on the front of the carrier, at the top and one (1) hooded spotlight on the rear left side, near the seat of the operator. These spotlights may be used when carrying loads of unusual length (over thirty-five (35) feet), when loading and unloading, and when

Exhibit N—(Continued)

maneuvering the vehicle in unusually difficult places, provided, however, that in case of a blitz or other similar situation, no spotlight shall be used. The hood shall encircle the circumference of the spotlight and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

"3.11. Road Sweepers. All lights on road sweepers shall conform to specifications set forth herein. Road sweepers may be equipped with a hooded spotlight of low power for the purpose of defining the curb line of the road, provided, however, that in case of a blitz or other emergency situation, no spotlight shall be used The hood shall encircle the circumference of the spotlight and shall protrude from the face of the lens horizontally a distance of at least two (2) inches greater than the diameter of the lens of the spotlight.

"3.12. Police Cars. All lights on police cars shall conform to specifications set forth herein. Police cars may be equipped with a hooded white spotlight, which may be used when responding to emergency calls or in other emergency situations, provided, however, that in case of a blitz or other similar situation, no spotlight shall be used. The hood shall encircle the circumference of the spotlight and shall protrude from the face of the lens horizontally

Exhibit N—(Continued)

a distance of at least two (2) inches greater than the diameter of the lens of the spotlight."

[136]

2. Amendment to General Orders No. 14, This Office, 10 March 1943.

2.01. Paragraph numbered 5.02, Title 5, General Orders No. 14, this office, 10 March 1943, as amended, hereby is amended to read as follows:

"5.02. The following officers hereby are designated District Property Comptrollers in their respective districts:

"Lt. Col. William P. Crum, F.A., District of Kauai; Major John D. Hagon, F.A., District of Maui; Captain Harold P. Luscomb, Inf., District of Hawaii;

1st Lt. John V. Beveridge, C.M.P., District of Molokai-Lanai."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D. Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

17 February 1944

General Orders
No. 51

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 3, This office, 10 March 1943.

1.01. Paragraph numbered 4.05, Title 4, General Orders No. 3, this office, 10 March 1943, as amended by paragraph numbered 1.01, Title 1, General Orders No. 47, this office, 20 December 1943, hereby is amended to read as follows:

"4.05. Twenty-Five Miles Speed Limit. Except as authorized by the civil or military police, no person shall operate any vehicle at a rate of speed in excess of twenty-five (25) miles per hour during the hours of darkness or during the hours of blackout."

By the order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D. Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [137]

Exhibit N—(Continued)

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

23 February 1944

General Orders
No. 52

AMENDMENTS TO GENERAL ORDERS

1. Amendments to General Orders No. 3, this office, 10 March 1943.

1.01. Paragraph numbered 2.11, Title 2, General Orders No. 3, this office, 10 March 1943, hereby is amended to read as follows:

"2.11. Flashlights. Flashlights may be used, either indoors or outdoors, at any time or times, during the hours of darkness and blackout, subject, however, to the provisions of this paragraph and to the other provisions of this General Orders. Military police, members of the United States Navy Shore Patrol, and civilian police officers are authorized to use flashlights with red or orange light, during said hours, either indoors or outdoors, while engaged in the performance of their official duties. Air Raid Wardens and Fire Wardens are authorized to use flashlights with a green light during said hours, either indoors or outdoors, while engaged in the performance of their official duties as such wardens. No person other than a member of the military police, or a member

Exhibit N—(Continued)

of said shore patrol, or such a civilian police officer engaged in the performance of official duties as aforesaid, shall use a flashlight with a red or orange light at any time during said hours of darkness and blackout, nor shall any person other than an Air Raid Warden or Fire Warden engaged in the performance of official duties as aforesaid, use a flashlight with a green light at any time during the said hours of darkness and blackout. Any person may use a flashlight with a white light, either indoors or outdoors, during said hours of darkness and blackout."

1.02. Paragraph numbered 3.03, Title 3, General Orders No. 3, this office, 10 March 1943, as amended, hereby is amended to read as follows: [138]

"3.03. No person, at any time or times during the hours of darkness and blackout, shall use or operate a tail light or lamp, or combination tail and stop light or lamp, or any other light on the rear of a vehicle, which allows a white light, a red light, or a light of any color to shine upward. Otherwise than as provided in the preceding sentence, and subject to territorial laws, city and county ordinances, and county ordinances, a person may use, at any time or times during the hours of darkness and blackout, the tail light or lamp or tail lights or lamps, or a combination tail and stop light or lamp and other lights and lamps on

Exhibit N—(Continued)

the rear of a vehicle, regardless of the color, brightness, or quantity of light emanating therefrom."

1.03. Paragraph numbered 4.06, Title 4, General Orders No. 3, this office, 10 March 1943, as amended, hereby is amended to read as follows:

"4.06. No Parking. No person shall park any vehicle, nor allow or permit any vehicle owned by him or in his care, control, or custody to be or remain parked, on any public thoroughfare, street, or highway, at any time or times, during the hours of blackout."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D. Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry

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Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T.H.

2 March 1944

General Orders
No. 53

AMENDMENTS TO GENERAL ORDERS

1. Amendment to General Orders No. 1, This Office, 10 March 1943.

Exhibit N—(Continued)

1.01. General Orders No.1, this office, 10 March 1943, hereby is amended by adding thereto a new title and a new paragraph to be respectively numbered and known as Title 3, General Orders No. 1, Office of the Military Governor, 10 March 1943, and Paragraph 3.01,Title 3, General Orders No. 1, Office of the Military Governor, 10 March 1943, and to read as follows:

"3. Assistant Executive to the Military Governor for Cargo and Passenger Control.

"3.01. Wayne C. Smith, Colonel, Infantry, hereby is appointed Assistant Executive to the Military Governor for Cargo and Passenger Control."

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Colonel, J.A.G.D. Executive

A True Copy:

ROBERT B. GRIFFITH
Major, Infantry [139]

EXHIBIT O

Provost Court Proceedings
In Session
Pearl Harbor, T. H. 29 February 1944

Name of accused: Lloyd Clifford Duncan, #116086 Residence: Citizenship: USA

Age: Where Employed: Descent: (father) (Mother)

Witnesses for Prosecution:

Witness for Accused: Copy of charge furnished accused.

Documentary Evidence:

Arresting Officer: Cpl. Bowerman, USMC

Charge: General Orders #2, Paragraph 8.01

That Lloyd Clifford Duncan, at Pearl Harbor, T. H., on the 24th day of February, A. D., 1944, did unlawfully, wilfully and maliciously assault, strike, beat and ill treat Robert C. Bowerman, Corporal U.S.M.C., and J. C. Hunter, PFC, USMC., with intent to resist, prevent, hinder and obstruct the said Robert C. Bowerman and J. C. Hunter in the lawful discharge, execution and performance of their official duties as sentries at the Main Gate, Navy Yard, Pearl Harbor, T. H., contrary to General Orders #2, Par. 8.01 of the Military Governor, Territory of Hawaii. (10 March 1943).

(Signature of Accuser)

/s/ LT. (JG) GENE A. TRINI

Lt. (JG) Gene A. Trini

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 29 day of February A.D. 1944, and made oath that he is a person subject to military law and that he personally signed the foregoing charge and had investigated the matters set forth in the charge, and that the same are true in fact, to the best of his knowledge and belief.

/s/ ARTHUR L. MUNDO
Lt. Comdr., U. S. Navy (Ret)
Provost Court

Case No. P.H. 650-44

The Charge	Plea	Findings	Sentence or Acquittal or Remarks
Foregoing			Summons Issued for 3-1-44
			Continued to 3-2-44
	Not guilty	guilty	6 months confinement

Pearl Harbor, T. H. 29 February 1944
/s/ ARTHUR L. MUNDO
Lt. Comdr., U. S. Navy (Ret)
Provost Court [140]

EXHIBIT P

(Copy).

Provost Court
Meeting at Navy Yard Pearl Harbor
Territory of Hawaii

THE MILITARY GOVERNOR OF THE TERRITORY OF HAWAII

Versus

LLOYD CLIFFORD DUNCAN
Accused.

PENAL SUMMONS:

The Military Governor of the Territory of Hawaii:
To Lloyd Clifford Duncan, #116086

On information of Lt. (jg) Gene A. Trini

You are commanded to appear at the Provost Court of Pearl Harbor, at Bldg. #69, Navy Yard, Pearl Harbor, T. H., on Wednesday the 1st day of March A. D., 1944, at 8:30 AM, then and there to answer the charge of violating General Order #2, Para 8.01

Failure to obey this summons will render you liable to attachment for contempt.

Given Under My Hand This 29 day of February A. D., 1944.

By Order of the Military Governor of the Territory of Hawaii:

By /s/ ARTHUR L. MUNDO
Lt. Comdr. U. S. Navy (Ret)
Provost Court meeting at
Pearl Harbor, T. H.

29 March 1944

Certified to be a true copy
/s/ GEORGE C. KREIS
Clerk, Provost Court, Pearl
Harbor, T. H. [141]

(If the accused is found, the officer making the return must use this form of service)
Served the within Summons on Lloyd Clifford Duncan therein named, by handing him a copy thereof and at the same time showing him the original, at 10:00 PM this 29th day of February A. D., 1944.
/s/ SGT. W. A. JOHNS
Police Officer.

EXHIBIT Q

Provost Court,
Pearl Harbor, T. H.
March 2nd, 1944.

P. H. 650-44—LLOYD CLIFFORD DUNCAN

The defendant, Duncan, having been previously arraigned and having plead not guilty, and having been asked by the Court if he desired counsel, and if he had witnesses, appeared on this date for trial, and the following proceedings were had:

Court: Q. I asked you yesterday if you had any witnesses and you said that you had two Mainland friends, but that their ship had left. Is that right?

A. Yes, sir.

Q. Are you ready to proceed?

A. Yes, sir.

Court: After the officers have testified you will be privileged to make a statement if you wish, or you may remain silent.

Upon the defendant's statement that he so desired to do, he and the two witnesses for the prosecution were duly sworn.

The prosecution began:

Q. Bowerman, state your full name to the Court.

A. Robert Carl Bowerman, USMC, Reserve.

Q. As to your duties at this time—will you give a short resume of them?

A. I was regularly posted as Corporal of the Guard from 2000 to 2400 at the Main Gate, Pearl Harbor, Navy Yard.

Q. Directing your attention to the 24th day of

Exhibit Q—(Continued)

February A. D., 1944, did you have duty as Corporal of the Guard at the Main Gate on that day?

A. Yes, sir.

Q. On that day did you have occasion to come in contact with the defendant, Duncan?

A. Yes, sir.

Q. Is he in Court at this time?

A. Yes, sir.

Q. Will you point him out.

A. He is on my left.

(Witness pointed out defendant in Court)

—1— [142]

Q. Now, directing your attention once more to the 24th day of February, 1944, did you have an altercation or a disagreement with the defendant, Duncan? A. Yes, sir.

Q. You were on duty at that time?

A. Yes, sir.

Q. Explain the circumstances in your own words surrounding your coming in contact with this defendant.

Well, sir, Duncan and a sailor friend, Wietus, came up to the gate at approximately 2210 or 2215, and Wietus said he wanted to know if he could get a truck to take him back to his ship that was tied up at Pearl City. I told him that he would not be permitted to enter the Navy Yard as his ship was berthed at Pearl City, and there was only transportation for ships in the Navy Yard. Do you want to hear the obscene part of it, Sir?

Court: Tell everything you know about this.

Exhibit Q—(Continued)

Continuing—While I was talking, Duncan was standing by and he said: "You fuckin marines are trying to give my buddy some shit." I looked at him and then turned my back to him, and he kept on, and then I said: "Why don't you shove off and let me handle this?" Then he said: "I don't have to shove off and I know you God-dam marines are going to fuck my buddy up." I told him that there was no bus going to his ship tied up at Pearl City and that Wietus could not enter the Yard. He started cursing me again, and then I walked up to him,—it was the first time that I had come close to him,—and I noticed that his face was flushed and his eyes were bloodshot and I could smell rum or whiskey on his breath. He was standing in the middle of the intersection swearing at me in a loud voice. There was traffic coming in at the time, a lot of officers and Navy nurses were coming in at that time, and I was expecting the Captain of the Yard and Admiral Ghormley. Then I told him he was under arrest for interfering with my duty and using profane language, and he said: "Fuck you, you can't arrest me because I'm a civilian." I saw that his badge was around his neck, but it was turned over or hidden so that I could not see it. I walked up to him to take his badge for identification—we always have to secure the badges of those we arrest, and he swung at me and missed me, so I took him by the arm to get him out of the intersection, because the traffic was tied up and there were people watching and a lot of congestion and confu-

Exhibit Q—(Continued).

sion. I asked him to give me his badge and he said: I am not going to give you my badge, and he struck me in the mouth.

Q. With his right hand or his left hand?

A. His right hand come up and struck me in the mouth.

Q. One time?

A. Yes, sir—one time he missed, and then he swung and hit me. Then Pfc Hunter jumped in to help me subdue him. He jerked loose and he hit me again below the eye, and he hit Hunter several times. [143]

Q. The left eye?

A. Yes, sir. There is just a little mark there now. All the time he was cursing and yelling that if he ever got loose he was going to kill us. I finally got his badge from him.

—2—

When he said I am not going to give you my badge —you Son-of-a-bitches are not getting this badge— at that time there were three Jeeps that pulled up and there were a lot of people. Pfc Legge, of the Yard Patrol, was in one of the Jeeps and heard him tell me to go to hell, and that he was going to kill us and all kinds of profane words too numerous to mention. Finally I got his badge away from him and then we took him over to the side out of the traffic and I told him to sit down, and he said: "I don't have to sit sit down. I am a civilian, not a service man." He finally sat down. All the time

Exhibit Q—(Continued)

he was calling us filthy names and he said if he ever met up with me he would kill me.

Q. Bowerman, prior to this altercation did you have occasion to put the defendant under arrest at the time you told him to shove off?

A. No, sir. I told him to shove off and then I turned my back to him.

Q. At that time you were allowing the defendant to go to his work, or else shove off?

A. Yes, sir. We always allow people to go on in after we check the badges. Usually, if they say something out of the way and we tell them to shove off they will do it.

Q. Did he do either one—proceed on into the Navy Yard, or else leave the gate?

A. No sir. He stood right there and argued with me in the middle of the intersection after I told him to step over to the side. When we put a man under arrest we always take their badge numbers right away.

Q. Did this happen at the Main Gate, Navy Yard, Pearl Harbor, T. H.?

A. Yes, sir.

Q. Did you have occasion to wrestle with him on the pavement?

A. We had to take him off the intersection.

Q. Did he resist you at that time?

A. Yes, sir, he was swinging at me.

Q. Did you see him hit Pfc Hunter?

A. Yes, sir. He was right next to me. He struck Hunter with his fist. He was swinging at

Exhibit Q—(Continued)

both of us while we were trying to get him to go over to the side. [144]

Q. Hunter was in the performance of his duty at the time?

A. Yes, sir.

Q. Did you have occasion to hit this man in any way during this altercation?

A. No, sir, we did not.

Q. You never injured him in any way?

A. No, sir.

Q. Simply told him to shove off and when he resisted you merely took him in custody?

A. Yes, sir.

Q. During the altercation did the people commence surrounding the scene and there was a lot of congestion?

—3—

A. Yes, there was a lot of congestion. There were a good many civilian workers coming in—it was the third shift—and there were a lot of service men pulling in and we blocked the traffic for quite a ways back.

Q. This altercation took your attention and also took Pfc Hunter's attention away from your duties?

A. Yes, sir. It broke up our system out there. One man is supposed to check bicycles, and he had to check both the bicycles and pedestrians while this was going on.

Q. Had the defendant been drinking?

A. Yes, sir, but I believe he would pass the sobriety test. His breath had a strong smell of rum

Exhibit Q—(Continued)

or alcohol. His eyes were blood shot and his face flushed. He could stand on his two feet and take care of himself. He walked up to the Sentry.

Prosecution: Thats all, Your Honor.

Court: (To defendant)—You may ask the witness any questions.

A. I have nothing to say to him.

The prosecution continued:

Q. State your full name to the Court.

A. Pfc James C. Hunter, USMC.

Q. You are in the USMC Reserve?

A. Yes, sir.

Q. You are also stationed at the Main Gate, Navy Yard, Pearl Harbor, T. H.?

A. Yes, sir. [145]

Q. You were on duty at the Main Gate on the 24th day of February, A. D., 1944?

A. Yes, sir, on duty with the Corporal of the Guard.

Q. You had occasion during the performance of your duties to come in contact with the defendant, Duncan?

A. Yes, sir. At that time I was checking incoming vehicles, and the defendant came up to me and asked me what we were going to do with his buddy. I told him I didn't have no time to fool around with him, and that I thought Bowerman knew what he was doing and would take care of him, and I went on checking cars. Then I saw Bowerman having some trouble with him and I went over to give him a hand. We did not strike him at any

Exhibit Q—(Continued)

time. I had him by one arm and Bowerman had him by the other arm. We were trying to get him over to the side. He struck Bowerman two times and he kicked me in the shins a number of times. He called Bowerman a Son-of-a-bitch and used violent language. About that time the Yard Patrol pulled up.

Q. Hunter, were there people standing around to hear the profanity at that time?

A. Yes, sir.

Q. Were you in close proximity to Bowerman to hear Bowerman say to either shove on or else go into the Gate?

A. Yes, sir. He came by me and asked me if my buddy was

—4—

giving him some shit, and I told him I thought he knew what he was doing.

Q. Do you know whether Bowerman put him under arrest?

A. Yes, sir. He put him under arrest.

Q. Did you try to assist Bowerman in the arrest of this defendant?

A. No, sir. Bowerman had already placed him under arrest.

Q. Thats when the defendant struck and kicked you?

Q. Prior to the time of this altercation did you see Bowerman grab hold of defendant's badge and swing and wrestle him around?

A. No, sir. At no time did Bowerman injure

Exhibit Q—(Continued)

or hit him. He never took hold of his badge until he was under arrest. When he asked him for his badge he told him that no God-dam marine was going to get his badge.

Q. Did either you or Bowerman strike or injure him prior to this altercation?

A. No, sir. [146]

Q. Did you see any club——

Court: Refrain from leading questions.

Q. What condition, or in what manner did you take hold of the defendant when he resisted arrest?

A. This man had already swung at Bowerman. Bowerman was trying to make him sit down. He struck Bowerman, and I went over and helped Bowerman sit him down. I had hold of his shoulder with my left hand and had ahold of his arm with my right hand—thats when he struck me.

Court: Q. Have you told everything you know about this—is that the whole story?

A. Yes, sir.

Court: (To defendant).

Q. Do you wish to ask this man any questions?

A. No, sir.

Prosecution rests:

Court: As I indicated before, you may at this time make a statement if you wish, or you may let the case rest upon the prosecution's evidence. If you wish to make a statement you have the right to do so.

Defendant: I would like to clear up a few details. My friend and I came through the gate. I

Exhibit Q—(Continued)

was going to work and he wanted to get a truck that would take him to his ship that was berthed at Pearl City. I asked some marine—I don't know who it was—where he could get transportation. The marine told him that he could not go to his ship that way. He was very discourteous about it. I told him not to pay any attention to the marine, because I knew he could catch a truck back to the ship—and he did. Then this marine——

Q. Which marine?

A. I don't know which one. I didn't pay any attention to the marine. The one marine came over and started arguing about

—5—

it—said that he could not get to his ship that way—he would have to go to Pearl City. I told him that this friend of mine wanted to catch the truck. This marine, he was getting pretty sore and abusive about it. Of course, I knew I was in the wrong—then he grabbed for my badge like he was going to tear it off, and I slipped to one knee and he pulled my badge off over my head. Then another fellow came over and took hold of me. He asked me to come over to the gate and sit down, which I did. I never resisted them at any time. This man said I was drinking, thats why they had a Navy Doctor examine me, and he pronounced me completely sober. [147]

Prosecution:

Q. You mean Corporal Bowerman?

A. No, the Navy Doctor.

Exhibit Q—(Continued)

Q. Is there anything else you wish to add?

A. Just the fact that they kept me here from 10:00 that night until 3:00 o'clock the next afternoon, and they never gave me anything to eat or drink. That I finally had a chance to make a statement. I lost $20.00 in pay for being off work. It seemed kind of unreasonable. The Navy Doctor examined me and he said I was completely fit. There was no purpose in my being kept here.

Court: (To prosecution)

Q. Do you wish to ask any questions?

The prosecution continued:

Q. Duncan, you do admit that when one of these marines told Wietus that he could not come in through the gate you told him that he did not know what he was talking about?

A. Yes, but I did not use profanity.

Q. After that you were arguing and using obscene language?

A. It was just about a 50-50 proposition there.

Q. At that time you had been drinking?

A. Yes, the day before was my day off.

Q. Had your friend been drinking also?

A. Yes, he had.

Q. You were told to shove off and you started arguing with the marine?

A. No, I never was talking to this marine. I never pay any attention to what marines do. I was just going right on to work.

Q. You do admit that you hit Corporal Bowerman with your fist?

Exhibit Q—(Continued)

A. When he grabbed my badge and pulled it off over my head I may have resisted or thrown up my arm. They said back there that I struck and hit with my fist—that seems kind of foolish because I was there all alone. Then they told me to sit down, which I did. Then they started roughing me up. I don't know if one purposely hit my nose with his club.

Q. You did not know whether it was purposely or accidental?

A. No, I don't know. He had it in his hand. I was not resisting—I went where they told me, and I gave them my

—6— [148]

identification. If he had asked me for my badge I would have given it to him. I guess I was not moving fast enough for him.

Q. That was when you started to fight and resist?

A. I didn't like to be kicked around like that. I was not even talking to the marines in the first place. I was all ready to go to work and mind my own business.

Q. You didn't mind your own business in the first instance?

A. I knew I was wrong—that if anything happened I would be wrong.

Q. That is all.

Court: Q. Do you wish to offer any rebuttal?

Prosecution: A. No, sir.

Court: Q. Where do you live, Mr. Duncan?

Exhibit Q—(Continued)

A. 2188 Kuhio Avenue, Honolulu.

Q. How old are you?

A. Twenty five.

Q. Where are you employed?

A. In the Pearl ~~Harbor Navy~~ Yard.

Q. In what Department?

A. Shop 11. Shipfitters' Shop.

Q. What is the descent of your father?

A. Scotch.

Q. Your mother?

A. Scotch-Irish.

Q. How long have you been out here?

A. A little over two years.

Q. Been working in the Navy Yard that long?

A. Yes, sir.

Q. Have you ever been in trouble before?

A. Just minor things—blackout violation.

Prosecution:

Q. Did you have a previous record about some cigarettes?

A. I had some Sea Store cigarettes.

Court: Q. Is there anything that you wish to tell the Court before I pronounce sentence?

A. No, sir. I have said all that I have to say.

Court: I find that the charges have been sustained by the evidence and pronounce you guilty. This appears to me to be a pretty serious case. I sentence you to six months confinement. [149]

EXHIBIT R

Mitt. Number PH 6-44
Case Number PH 650-44

Provost Court of Pearl Harbor, City and County of Honolulu
Territory of Hawaii

MITTIMUS

The Territory of Hawaii:

To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu, or his Deputy; Lloyd Clifford Duncan having been convicted in the Provost Court of Honolulu, City and County of Honolulu, of the Offense of, to wit:

> General Order #2 Paragraph 8.01
> The Lloyd Clifford Duncan, at Pearl Harbor, T. H., on the 24th day of February 1944, did unlawfully, wilfully and maliciously assault strike, beat and ill treat Robert C. Bowerman, Corporal USMC, and J. C. Hunter, Pfc, USMC, with intent to resist prevent, hinder and obstruct the said Robert C. Bowerman and J. C. Hunter in the lawful discharge, execution and performance of their official duties as sentries at the Main Gate, Navy Yard, Pearl Harbor, T. H., contrary to General Orders #2 Paragraph 8.01 of the Military Governor of the Territory of Hawaii (10 March 1943)

and by said Court on this day sentenced to be imprisoned in the Honolulu Jail for the term of Six

(6) Months and to pay a fine of ..... Dollars, or to be imprisoned in the Honolulu Jail until said Fine be paid:

You Are Ordered to take said Lloyd Clifford Duncan into your custody, and to cause said sentence to be executed. Hereof fail not.

Given Under My Hand This 2nd day of March, A. D., 1944.

/s/ ARTHUR L. MUNDO
Lt. Comdr. US Navy. (Ret)
Provost Court

[Endorsed]: Filed March 20, 1944. [150]

[Title of District Court and Cause.]

TRAVERSE

Your petitioner, Lloyd C. Duncan, files this, his traverse to the return and answer to the Order to Show Cause filed by respondent, Duke Paoa Kahanamoku, sheriff of the city and county of Honolulu, and says:

I.

That your petitioner denies all of the material allegations therein set forth or as much thereof as is relevant to the issues in this case except those allegations which admit facts set forth in his petition and except those allegations which are expressly admitted herein;

II.

That petitioner admits: the allegations contained in Paragraphs I-1, 2 and 3 and Paragraph II-1, 2, 3 and 4; and admits the existence of war with Japan and Germany; that Hawaii is a powerful base with vast numbers of military and naval personnel, vast military, naval and civilian stores, munitions, equipment and supplies for waging war (Par. II-6); the exchange of radiograms between the Governor of Hawaii [152] and the President; petitioner admits (without conceding their validity) the issuance of the proclamations and general orders referred to in said return and answer;

III.

Answering Paragraphs I-4 and 8, petitioner says that he was first summoned to appear before the provost court on March 1, 1944 and did appear on said day but the case was postponed until March 2, 1944 because the witnesses for the prosecution were absent; that he was brought to trial on March 2, 1944, shortly before 9 A. M., immediately after his work on a ten hour graveyard shift; that at the time he was tired, dirty and wholly unpresentable; that he was was wholly unaware of his legal and constitutional rights, unaware of General Orders No. 2, paragraph 8.01; that he did not know of the lack of lawful authority of the provost court to try him for the alleged offense, was unaware of the necessity of being represented by counsel, was ignorant of his rights to have the trial continued until witnesses could attend and testify in his behalf, was unaware

of the right to have the compulsory attendance of witnesses and that therefore did not with full knowledge and understanding of his legal and constitutional rights waive the assistance of counsel or waive the right to object to the jurisdiction of the provost court or waive the right to a constitutional trial; that at said hearing the prosecutor, the two marines and himself lined up standing in a row and with no one present to advise or assist petitioner in any of his aforesaid rights and at the conclusion of a perfunctory hearing lasting approximately ten minutes he was sentenced to six months in the county jail and then taken from the courtroom.

[153]

IV.

Answering Paragraph 8 of the return, petitioner admits that his trial was for an alleged violation of General Orders No. 2, paragraph 8.01, but says that said order did not constitute an offense for which he could be tried by provost court under the Constitution and laws of the United States and that even if the violation of said order did constitute an offense triable before a military tribunal under the Constitution and laws of the United States that petitioner did not in fact violate said order and that the actual existence or nonexistence of the facts which might constitute a violation of said order is a jurisdictional fact and that the provost court is not and cannot be the conclusive judge of its own jurisdiction; petitioner further says that at most the offense for which he could be lawfully tried is the offense of assault and battery under R.S. 5346,

U.S.C. title 18, sec. 455 which cases are regularly tried in this court; petitioner further denies the existence of any military necessity for his trial in said provost court;

V.

That your petitioner denies the lawful existence of the office of military governor of the Territory of Hawaii at any time from December 7, 1941 to date and says that a military government and a military governor can only exist, under the Constitution and laws of the United States, over the inhabitants, lands and property of the enemy or allied or domestic territory recovered from enemy occupation or rebels treated as belligerent and that this fact is well known to the military and naval services and is expressly set forth in the Rules of Land Warfare FM 27-10 (1940) and the official [154] United States Army and Navy Manual of Military Government and Civil Affairs, 22 December 1943, FM 27-5, OPNAV-50E-3, Section 1, and the attempt by the subordinates of the alleged military governor to enact laws, and to provide for the trial, conviction, sentence and imprisonment of petitioner, insofar as they relate to the facts of this case, is contrary to the Federal Constitution and wholly void;

VI.

That petitioner denies that the Territory of Hawaii is now or for more than a year has been in imminent danger of invasion as that expression is used in Section 67 of the Hawaiian Organic Act and petitioner denies that the public safety now or for

more than a year prior to his trial, has required that the privilege of the writ of habeas corpus be suspended or that the Territory be placed and remain under martial law; that Hawaii is not now and for a long period prior hereto has not been within any combat area or in imminent danger of invasion and that the combat area in the Pacific to the best of petitioner's knowledge is now more than 2,000 miles west of the Territory of Hawaii;

Wherefore, your petitioner reiterates the allegations of this petition and prays that the court make the following findings of fact and rulings of law:

(1) That the office of military governor is nonexistent and that the orders issued out of said office with respect to the erection of provost courts purporting to give said provost courts jurisdiction to hear and determine the offense of which petitioner was charged are null and void;

(2) That the proclamation of the governor of the [155] Territory of Hawaii does not purport to suspend the privilege of the writ of habeas corpus in cases of this character;

(3) That as a matter of fact the Territory of Hawaii is not now and for more than a year prior hereto has not been in imminent danger of invasion;

(4) That as a matter of fact the public safety does not now and has not for more than a year prior hereto require that the privilege of the writ of habeas corpus be suspended;

(5) That martial law has not lawfully existed in the Territory of Hawaii for more than a year prior to petitioner's trial;

(6) That as a matter of law the privilege of the writ of habeas corpus has not been suspended as to this case;

(7) That whether or not martial law is now in effect and the privilege of the writ of habeas corpus is now suspended in certain cases involving military security, there exists no military necessity for the trial and conviction in a provost court of petitioner for the acts of which he was tried, convicted and sentenced as set forth in the petition;

Wherefore, your petitioner prays that he may be forthwith discharged from all custody and restraint; that he may be granted his freedom and liberty and that his bond given herein be cancelled.

Dated: Honolulu, Hawaii, April 4, 1944.

/s/ LLOYD C. DUNCAN,
Petitioner. [156]

Territory of Hawaii
City and County of Honolulu—ss.

Lloyd C. Duncan, being first duly sworn under oath deposes and says that he is the petitioner named in the foregoing Traverse; that he has read the same, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

/s/ LLOYD C. DUNCAN.

Subscribed and sworn to before me this 4 day of April 1944.

/s/ FLORENCE LEE,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1945.

[Endorsed]: Filed April 4, 1944. [157]

[Title of District Court and Cause.]

WRIT

The President of the United States to Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, Territory of Hawaii.

Greeting:

We command you that you have the body of Lloyd C. Duncan by you imprisoned and detained as it is said together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged before the District Court of the United States for the Territory of Hawaii in the Federal Court, Federal Building, Honolulu, on the 31st day of March, 1944, at 10:40 o'clock A. M., to do and receive what then and there shall be considered concerning the said Lloyd C. Duncan and have you then and there this writ.

Witness the Honorable D. E. Metzger, Judge of the United States District Court for the Territory of Hawaii.

(Signed) WM. F. THOMPSON, JR.
Clerk, United States District Court for the Territory of Hawaii.

The foregoing is hereby allowed this 31st day of March, 1944.

(Signed) D. E. METZGER.
United States District Judge.

[159]

United State's Marshal's Office
Marshal's Return

The within Writ was received by me on the 31st day of March, A.D. 1944 and is returned executed this 31st day of March, A.D., 1944 upon Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, Territory of Hawaii by exhibiting to him the original Writ and by handing to and leaving with him a certified copy of the same.

Dated at Honolulu, T. H. this 31st day of March, A.D. 1944.

(Signed) OTTO F. HEINE,
U. S. Marshal, District of Hawaii.

Civil	7-408
Marshal's	Docket
No. 2455	
Court No.	H.C. 298
Fees	$2.00
Expenses	
Total	$2.00

[Endorsed]: Filed Mar. 31, 1944. [160]

[Title of District Court and Cause.]

FINDINGS AND CONCLUSIONS

Before argument of counsel on the issues of this case was begun the court made the following announcement and rule:

The questions in this case are not whether Lloyd C. Duncan created a disturbance on a naval reservation where he was employed, or whether he committed an assault on marine guards or was assaulted by marine guards, or whether he had a fair trial before an army provost court, in accordance with late day practice before such courts, or whether he was unjustly found guilty and given an inordinately severe sentence upon the offense charged, or whether he was mistreated by the sheriff in being forced to perform hard labor when the mittimus under which the sheriff took him in custody did not impose hard labor, nor whether the sheriff has any lawful right or power to assign

hard labor upon a prisoner taken by him into the city and county jail, even had the mittimus demanded it.

These questions were of passing interest during the trial and much testimony was offered as to some of them, but all of them are considered immaterial and irrelevant to the predominant and controlling question presented in [162] the case, and all evidence relating to them will be disregarded. It is now ordered stricken.

The question here is: Has a Provost Court, set up in the Navy yard at Pearl Harbor, Oahu, under an order of October 27, 1943, of "the Military Governor of the Territory of Hawaii," lawful power to try and convict a civilian residing outside of any naval or military reservation, of violation of an order of the Military Governor of March 10, 1943, committed on a naval reservation with respect to naval personnel?

The Provost Court in question was set up by the appointment by General Orders No. 39 of October 27, 1943, emanating from the Office of the Military Governor at Honolulu, designating Lt. Comdr. Arthur L. Mundo, United States Navy, as a Provost Court at U. S. Navy Yard, Pearl Harbor, Oahu, T. H. and assigning him to duty "for the trial of such persons as may properly be brought before the court."

The main question is involved in and brings forward several other questions, one of underlying and vital importance being:

Did the Office of Military Governor of the Terri-

tory of Hawaii lawfully exist at the time it appointed Lt. Comdr. Mundo as a Provost Court at Pearl Harbor Navy Yard?

This question is directly at issue and to my mind a determination of it disposes of the entire case.

In considering this question we must go back to the day when Japan's forces attacked Pearl Harbor, December 7, 1941, upon which day Governor Poindexter issued a proclamation declaring that the Hawaiian Islands were attacked and invaded by the armed forces of the Empire of Japan, and that public safety required the suspension of the privilege of the writ of habeas corpus until further notice, also placing the Territory under martial law, and further, requesting the [163] Commanding General in the Hawaiian Department to exercise all the powers normally exercised by him, as Governor during the existing emergency and until the danger of invasion was removed. The Governor in his proclamation then went further and said he authorized and requested the Commanding General and his subordinate personnel to whom he might delegate such authority, during the emergency and until the danger of invasion was removed, to exercise the powers normally exercised by judicial officers, and employees of the Territory and the counties and cities therein, and such other and further powers as the emergency may require. The Governor presumed, and stated, that he acted under authority of the provisions of Section 67 of the Organic Act, which says:

"Sec. 67. Enforcement of law. That the Gov

ernor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known." 48 U.S.C.A. 532.

Under color of the Governor's relinquishment and transfer of the powers and duties placed upon and required of him by this and other sections of the Organic Act, the Army took over and established what it called the Office of Military Governor. The Commanding General (Lt. General, Walter C. [164] Short) issued a proclamation of his own in which he said:

"I announce to the people of Hawaii, that, in compliance with the above request of the Governor of Hawaii, I have this day assumed the position of Military Governor of Hawaii, and have taken charge of the Government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense."

* * * * *

"The imminence of attacks by the enemy and the possibility of invasion make necessary a stricter control of your actions than would be necessary or proper at other times. I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects."

This form of military government continued without abatement until March 10, 1943, during which time more than 180 General Orders were issued from the Office of the Military Governor regulating the acts and affairs of the population of the islands and the management of their property in many particulars.

On August 17, 1942, Ingram M. Stainback was inducted into office as Governor of the Territory, succeeding Governor Poindexter who had abdicated to the Army command on December 7, 1941.

The evidence shows that at the time or shortly after his inauguration to office Governor Stainback became convinced that there existed no right or reason for the continuation of the suspension of the writ of habeas corpus or the continuation of martial law in any form; that he went to the National Capitol for the purpose of discussing this situation with the Department of the Interior and the Department of Justice in the hope of having military govern- [165] ment removed and civil government fully restored; that he was met there by General Emmons then Commander of the Hawiian Divi-

sion, and later found the War Department officials adamant in the contention that military government should be continued here as a military need, particularly in the control of labor. That, after more than a month of frequent, almost daily, conferences between officials of the Departments of Interior, Justice, and War, a compromise was agreed upon, which he says was to restore about ninety-five per centum of the civil government to civil administration, in accordance with laws; that he deemed it impossible to convince all of the three departments in conference of the merits of his contentions and concluded that a half-loaf was better than none at all.

Accordingly upon his return here he issued, on February 8, 1943, a Proclamation, the form of which had been prepared and agreed upon by the conferees at Washington. This proclamation sets forth a Whereas, that the Governor of Hawaii on December 7, 1941, placed the Territory under martial law and the President confirmed that action on December 8, 1941, and then recites a Whereas that such state of martial law continues in effect and the privilege of the writ of habeas corpus remains suspended. The Proclamation then proclaimed, under the stated authority given by Section 67 of the Organic Act:

1. That, "The Governor of Hawaii and the other civilian officers and agencies of the Federal, the Territorial and the local governments, will resume on the thirtieth day hereafter their respective jurisdictions, functions and powers, according to law,

with respect to the following matters, and others necessarily related thereto:"

2. Thereafter are enumerated and listed eighteen general and specific classes of activities, including [166] "Judicial proceedings, both criminal and civil," which are to be performed, according to law.

Now, one feature of this proclamation has been construed by this Court, that relating to the suspension of the writ of habeas corpus and that question is in a category somewhat akin to res judicata, more scientifically described as stare decisis.

There remains the question: was martial law likewise revoked and brought to an end by the Governor's said proclamation, or, had it already ceased to lawfully exist by reason of the change in conditions respecting imminent danger of invasion.

The Governor testifies that he was emphatically of opinion that it should be revoked absolutely as, in his judgment, based upon surrounding and prevailing facts and conditions there existed no necessity that could support it, but that it was the agreed intention of the Washington conferees, in which he joined for policy reasons, that military government should be abolished only in part and that a part of it, which General Richardson calls a modified form of martial law, should remain in force and effect.

General Richardson comes into court and testifies at considerable length that in his opinion the continuation of martial law is absolutely necessary, in its present form as a modified military government in his hands for the safety of the population here

and in the proper prosecution of war efforts. He argues in his testimony that he should have control over the civilian population in this area as well as the armed forces and have full authority to establish the control courts for enforcing his orders relating to certain civilian acts and conduct. In support of the legality of martial law he states his opinion to be that Hawaii is and has been continuously since December 7, 1941, in imminent and constant danger of attack by Japanese agencies of warfare. [167]

Admiral Nimitz agrees with General Richardson as to the possibility of some form of warfare attacks and as to the desirability and expedience of retaining the present military government.

Both gentlemen, however, agree that an invasion by enemy troops is now practically impossible.

With due respect to the opinions of General Richardson and Admiral Nimitiz that martial law is desirable and necessary in a field of war operations that distributes supplies, trains soldiers, marines and sailors, and is a seat of administration of war activities, I find myself bound not by their opinions, but by the laws of the land, in arriving at legal conclusions.

The United States of America, of which Hawaii is an integral part, are governed by constitutionally established laws, laws to which their people are entitled, as well as being subjected—primarily, the national Constitution, and secondarily, the laws enacted by the Congress. It is a matter of general

knowledge that the people, with few exceptions, wish to protect and perpetuate that system, and such purpose is an issue in the present war. Some countries in Europe have tried a dictator system where the dictator could peremptorily pronounce laws and the rights of the subject to life and liberty, as he and his self-appointed courts and executives might decide from time to time. Many views have been advanced that such is the correct and efficient system for successfully conducting war, but that system is now on its way out. It is the antithesis of Americanism and nothing short of riotous conditions and dissolution of lawfully constituted government can justify it in civilian affairs of the land.

Civil affairs and civil government extend, to operation of law, to the battle zone of military camps, even in time of war and, for many purposes, inside military reservations, particularly where civilians are concerned. [168] Camp followers and civilians attached to military war activities do, as to certain of their acts, come absolutely under military control and are subject to military law and court martial for certain offenses and disobediences when serving in the field of battle. No part of the Island of Oahu in the Territory of Hawaii is in a battle field today, nor has it been for over two years, nor was the petitioner serving the Army in the field. These facts were fully shown by evidence. The Navy has recently been given similar authority

by Congress, but not in Hawaii, except as to Midway, Palmyra, and Johnston islands.

We have now been at war with Japan for over two years and four months—and I recognize it to be a well known fact that during this time the entire nation, particularly the Congress of the nation, has been enthusiastically war-minded to a degree that any protective measures desired by the Army or Navy could be had for the asking, upon a reasonable and convincing showing of such needs. Much legislation of such kind has been enacted. If the present laws do not give the Nation the fullest desirable protection against subversive or suspicious Japanese aliens, or even native-born persons of alien parentage, and such fact is known to the Army or Navy organizations, clearly it is the duty of such organizations to ask for legislative curb and procedure, instead of insisting upon holding by force of arms an entire population under a form of helpless and unappealable subjugation called martial law or military government, under the reasoning of Army or Navy officers that such form of government is required, or is convenient to them, in local and national portection and safety.

There can be no question that martial law depends for its creation and existence upon a condition of disorder so great as to disrupt the orderly performance of civil government. [169] It cannot be justified under the Constitutional provisions for the operation of our government upon any claim of military convenience or economic practicality.

Congress may give the Territory of Hawaii any

form of government it may see fit, conformable to Constitutional provisions, but no one in the War Department has such lawful power.

We entertain the highest respect for the gentlemen who gathered with Governor Stainback at Washington and discussed the problems confronting the war administration here in late 1942. No one could question their earnest sincerity in efforts to provide for the best protection of national war interests. That, however, is outside of the problem brought before the court. The court must look into their lawful authority to devise and lay down a government for the people of Hawaii. No one among them had authority, under the known conditions that prevailed at that time, to declare martial law or order that it be continued. The Governor was the only one in whom the power was vested under the Organic Act to declare it under any circumstances. At that time he could not make the finding of fact that was necessary for its lawful declaration. Upon the contrary, he knew that all grounds of necessity in public safety had passed. He had no more authority to declare it in part than in whole.

If he and the other gentlemen acted upon the assumption that the executive and judicial government of Hawaii had lawfully passed to the hands of the Commanding General of the Hawiian Department by reason of Governor Poindexter's proclamation, and was then vested there, they were in error, for the Organic Act, under which the Governor avowedly acted, gave him no such power of

transfer or abdication, but fixed upon him alone the responsibility for the faithful execution of the laws of the United States and of the Territory within [170] the Territory.

The right to establish martial law under Sec. 67 of the Organic Act springs from the necessity arising from disorders such as disrupt and make inoperative civil government and it ceases and becomes unlawful as soon as the civil government is capable and willing to resume its normal functions.

It is argued by the assistant United States Attorney General, appearing in the case for the Respondent, the custodian of the City and County of Honolulu jail, that when martial law was once declared by the Governor and his action was approved by the President it must continue until the President revokes the order and restores the rights of civil government. I do not so construe the meaning or purpose of the last sentence of Sec. 67 of the Organic Act. Proclaiming martial law and suspending of the privilege of the writ of habeas corpus being drastic and extraordinary measures, it is but reasonable to suppose that Congress in entrusting such powers with the Governor of Hawaii considered that it should provide some supervisory check, and gave power of veto to the President. I can see nothing to justify a supposition that in giving the Governor authority to evoke such rules, if in his judgment a condition of high disorder existed or threatened, Congress intended that once he had so acted Presidential approval should be required to undo his act which had displaced the govern-

ment which Congress had carefully provided. Tidal floods, earthquakes, or riots might make it seem necessary to call out the militia and declare martial law in given districts for a short time, and it does not make sense to suppose that Congress intended in the year 1900, when the speediest known means of communication with Washington might require as much as three weeks time in either direction, that martial law once evoked here must continue until undone by the President, notwithstanding [171] that the Governor might discover he had erred in judgment in having evoked it, or that its legitimate purpose had been fully served.

I find from the evidence that at all times during the year 1943 and continuing to this day, conditions were such throughout all the principal islands of the Territory of Hawaii that the regularly constituted civil government was either in efficient operation or fully capable of such operation in all its branches and ordinary departments and was sufficiently equipped, capable and willing to perform all functions for which it was created.

I find from the evidence that while the Island of Oahu may have been on March 2, 1944, and thereafter to this day, subject to possible attack by enemies at war, that it was not then, nor is it now, in imminent danger of invasion by hostile forces, neither was or is it in rebellion.

I conclude as a matter of Law:

1. That martial law did not lawfully exist in the Territory of Hawaii during the year 1943, particularly after March 10, 1943.

2. That the Office of Military Governor of the Territory of Hawaii is without lawful creation, and as such office, possesses no lawful authority over civilian affairs or persons.

3. That the Office of Provost Court at Pearl Harbor Navy Yard, Oahu, T. H., created by General Orders of the Military Governor, possessed no authority in law to try, find guilty, and sentence the civilian petitioner to imprisonment in the county jail of the City and County of Honolulu.

Wherefore, the writ is sustained and the petitioner ordered discharged from custody. [172]

It is also ordered that his appearance bond be and it hereby is cancelled and the cash bail deposited by him with the clerk be refunded.

(S) DELBERT E. METZGER
Judge, United States District Court for and in the Territory of Hawaii.

Dated this 13th day of April, 1944.

[Endorsed]: Filed April 13, 1944. [173]

In the United States District Court for the
Territory of Hawaii
April Term 1944

Habeas Corpus No. 298

In the Matter of the Application of

LLOYD C. DUNCAN,

For a Writ of Habeas Corpus

JUDGMENT

Pursuant to the Findings and Conclusions of the court filed in the above cause on April 13, 1944, it is hereby

Ordered, Adjudged and Decreed that the Writ of Habeas Corpus be and the same hereby is sustained and the petitioner be and hereby is ordered, discharged from custody, and it is

Further Ordered, Adjudged and Decreed that the petitioner's appearance bond be cancelled and the cash bail deposited by him with the clerk be refunded; provided further that in the event an appeal is taken from this judgment the petitioner is ordered enlarged upon his personal recognizance.

Dated: April 20th, 1944, at Honolulu, T. H.

(Signed) DELBERT E. METZGER,
Judge, United States District
Court, District of Hawaii.

[Endorsed]: Filed April 20, 1944. [175]

[Title of District Court and Cause.]

EXCEPTIONS TO FINDINGS AND CONCLUSIONS

The Respondent, Duke Kahanamoku, respectfully objects and excepts to the Findings and Conclusions filed here in on April 13, 1944, and to the ruling and order in the said Findings and Conclusions that all evidence be stricken which relates to the questions whether the Petitioner committed an assault or was assaulted or whether he was fairly tried and sentenced by the Provost Court and imprisoned under proper conditions.

Dated this 20th day of April, 1944, Honolulu, T. H.

(Signed) G. D. CROZIER,
United States Attorney, District of Hawaii,
(Signed) EDWARD J. ENNIS,
Special Assistant to the Attorney General,
Attorneys for Respondent.

The foregoing exceptions are hereby allowed.

Dated this 20 day of April, 1944, Honolulu, T. H.

(Signed) DELBERT E. METZGER,
Judge, United States District Court, District of Hawaii.

[Endorsed]: Filed April 20, 1944. [176]

[Title of District Court and Cause.]

ORDER ON TAKING APPEAL

Upon motion of Respondent, and it appearing that the transcript of the proceedings and hearing herein may not be completed by the Court Reporter within the ten (10) day period provided for appeal by Rule 126 of this Court, because of the length of the hearing and other official duties of the Reporter, and it further appearing that the Findings and Conclusions herein dated and filed on April 13, 1944, were not made in open Court at the conclusion of the hearing and argument on April 12, 1944, it is hereby

Ordered, Adjudged and Decreed that Rule 126 shall not be applicable to this cause and the time for taking, allowing and perfecting appeal from the final decision and judgment herein filed on April 20, 1944 be and the same hereby is fixed at the period of thirty (30) days from the filing of said decision and judgment and until and including May 20, 1944; and it is

Further Ordered, Adjudged and Decreed that Rule 124 of this Court shall not be applicable to this cause and the appeal herein may be taken by filing a written notice of appeal from the aforesaid final decision and judgment within the aforesaid thirty (30) day period and in the manner prescribed in the Rules of Civil Procedure for the District Courts of the United States.

Dated this 20th day of April, 1944, Honolulu, T. H.

(Signed) DELBERT E. METZGER,
Judge, United States District Court, District of Hawaii.

(Signed) J. FRANK McLAUGHLIN,
Judge, United States District Court, District of Hawaii.

[Endorsed]: Filed April 20, 1944. [177]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Respondent, Duke Kahanamoku hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment herein filed April 20, 1944 sustaining the Writ of Habeas Corpus.

Dated: Honolulu, T. H., this 20th day of April, 1944.

(Signed) G. D. CROZIER,
United States Attorney, District of Hawaii,

(Signed) EDWARD J. ENNIS,
Special Assistant to the Attorney General,
Attorneys for the Respondent Appellant.

Allowed:

(Signed) DELBERT E. METZGER,
Judge of the above entitled Court.

Copy received:

ROBERTSON CASTLE & ANTHONY,

By (Signed) GARNER ANTHONY,
Attorneys for Petitioner Appellee.

[Endorsed]: Filed April 20, 1944. [178]

[Title of District Court and Cause.]

RELEASE OF PETITIONER ON HIS OWN RECOGNIZANCE

Be It Remembered, That on this 27th day of April, A. D. 1944, before me, Wm. F. Thompson, Jr., Clerk of the United States District Court aforesaid, personally came Lloyd C. Duncan, residing at 2088 Kuhio Avenue, Honolulu, T. H. and acknowledged himself to owe to the United States of America the sum of Five Hundred Dollars ($500.00), to be levied on his goods, chattels, lands and tenements, to and for the use of the United States aforesaid, in case default be made in the condition of this recognizance, which is: That if the said Lloyd C. Duncan shall personally be and appear in this Court to answer and abide by the judgment in the appellate proceeding in the above cause, and shall then

and there abide the order and judgment of this Court and not depart the Court without leave thereof, then this recognizance to be void; otherwise to remain in full force and effect.

(S) LLOYD C. DUNCAN.

Taken and acknowledged before me this 27th day of April, A. D. 1944.

(S) WM. F. THOMPSON, JR.,
Clerk, United States District Court.

[Endorsed]: Filed April 27, 1944. [180]

[Title of District Court and Cause.]

RESPONDENT APPELLANT'S DESIGNATION OF RECORD

The Respondent Appellant herein, Duke Kahanamoku, designates the entire record, proceedings and evidence, together with all the exhibits, to be included in the record on appeal:

1. Petition for a Writ of Habeas Corpus and all the Exhibits annexed thereto.
2. Transcript of proceedings in the District Court on March 14, 1944. (Copies of transcript designated here and elsewhere in this Designation to be supplied in connection with this Designation.)
3. Order to Show Cause dated March 14, 1944.
4. Motion by Respondent dated March 20, 1944 to extend time to answer Petition and Order to Show Cause.

5. Transcript of proceedings in District Court on March 20, 1944.

6. Order dated March 20, 1944 extending time to file Answer and Return.

7. Answer and Return dated March 29, 1944 to Petition and Order to Show Cause and to the Writ of Habeas Corpus and all the Exhibits annexed thereto.

8. Transcript of proceedings in the District Court on March 31, 1944.

9. Writ of Habeas Corpus and Marshal's return endorsed thereon.

10. Traverse dated April 4, 1944, [182]

11. Transcript of proceedings in the District Court on April 5, 6, 7, 8 and 11, 1944 and all the evidence, testimony and Exhibits in such proceedings as follows:

a. Testimony of Petitioner's witnesses Riley H. Allen, Judge Steiner, Judge Cristy, Gus K. Sproat, Governor Stainback and Shunzo Sakamaki.

b. Petitioner's Exhibits "A" to "H" inclusive, "J" to "V" inclusive.

c. Testimony of Petitioner's witnesses Lloyd C. Duncan, Robert Wietus, Christopher Matsler, David Melville and James W. Duncan.

d. Testimony of Respondent's witnesses Admiral Chester W. Nimitz, Lt. General Robert C. Richardson, Jr., Governor Stainback, Capt. Frank Wickhem, Mr. Robert Murakami and Lt. Andrew Wong.

e. Respondent's Exhibits 4 to 18 inclusive.

f. Testimony of Mrs. Alice Thompson, Cpl. Robert C. Bowerman, Pfc. Hunter, Lt. Trini, Civil Police Officer Robert Roan and Commander Mundo.

g. Respondent's Exhibit 1.

12. Court Minutes of April 12 and 20, 1944.

13. Findings and Conclusions of Court dated April 13, 1944.

14. Exceptions to Findings and Conclusions dated April 20, 1944.

15. Final Judgment sustaining writ of habeas corpus dated April 20, 1944.

16. Order on Taking Appeal dated April 20, 1944.

17. Notice of Appeal dated April 20, 1944 to the Circuit Court of Appeals, Ninth Circuit.

18. This Designation.

19. Petitioner Appellee's Counter Designation.

20. Clerk's certification to transcript of record on appeal.

Dated this .. day of April, 1944, Honolulu, T. H.

[183]

(Signed) G. D. CROZIER,
United States Attorney, District of Hawaii.

(Signed) EDWARD J. ENNIS,
Special Assistant to the Attorney General.
Attorneys for Respondent Appellant. [184]

[Title of District Court and Cause.]

PETITIONER'S COUNTER DESIGNATION OF RECORD

The petitioner designates the entire record, proceedings and evidence, together with the exhibits be contained in the record on appeal as set forth in the respondent's designation of record, except the following parts of the record, proceedings, evidence and exhibits which the petitioner believes to be immaterial and irrelevant:

(1) So much of petitioner's testimony that relates to what transpired on February 24, 1944, at the main gate, Pearl Harbor, in connection with the alleged assault;

(2) All of the testimony, proceedings and exhibits referred to in respondent's designation in paragraph 11-e, f and g;

(3) The following exhibits offered in evidence by petitioner:

Exhibit I, re Orders to troops, Hawaiian Department

Exhibit O, Textbook on Nationality Law [186]

(4) Respondent's Exhibits 1, 2, 3, 6, 14.

(5) All of respondent's Exhibit M (Hawaii Defense Act Rules) except the following:

Rules Nos. 1, 2, 14, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 66, 78, 79, 86, 89, 90, 93, 95, 96, 97.

Petitioner hereby designates all of the clerk's

minutes and the personal recognizance to be included in the record on appeal.

Dated this 27 day of April 1944, Honolulu, T. H.

ROBERTSON, CASTLE & ANTHONY,

By (Signed) GARNER ANTHONY,

Attorneys for Lloyd C. Duncan.

[Endorsed]: Filed April 27, 1944. [187]

From the Minutes of the United States District Court for the Territory of Hawaii

Tuesday, March 14, 1944

[Title of Court and Cause.]

On this day came Mr. Garner Anthony of the firm of Robertson, Castle & Anthony, counsel for the petitioner herein, with Mr. James Duncan, brother of said petitioner, and also came Mr. G. D. Crozier and Mr. Edward A. Towse, United States District Attorney and Assistant United States Attorney, respectively, and Mr. Nils Tavares, Attorney General of the Territory of Hawaii as amicus curiae, and Lt. Col. Eugene V. Slattery, Office of the Military Governor, and Capt. Frank Wickhem, Provost Court Commissioner. This case was called for hearing on prayer of the petition.

Opening statement was made by Mr. Anthony.

Following argument by respective counsel, the Court ordered that an Order to Show Cause be

issued forthwith to Sheriff Kahanamoku, returnable Monday, March 20, 1944 at 10 a. m. directing him to appear and to show cause why a writ should not issue. [188]

From the Minutes of the United States District Court for the Territory of Hawaii
Monday, March 20, 1944

[Title of Court and Cause.]

On this day came Mr. Garner Anthony of the firm of Robertson, Castle & Anthony, counsel for the petitioner herein, and also came Mr. G. D. Crozier and Mr. Edward A. Towse, United States District Attorney and Assistant United States Attorney, respectively, counsel for the respondent herein, Mr. Duke P. Kahanamoku. This case was called for hearing on motion for an order granting enlargement of time within which to file return, answer, or otherwise plead to order to show cause.

Mr. Crozier urged that the motion for order granting enlargement of time be granted.

Mr. Anthony informed the Court that he had no objection to the granting of the motion; provided that defendant be released at this time on bond.

Following remarks by respective counsel, the motion was granted by the Court.

The Order was presented to the Court, signed and ordered filed. Said Order reads as follows:

"Habeas Corpus No. 298

"In the Matter of the Application of
Lloyd C. Duncan,

For a Writ of Habeas Corpus.

"Order

"Good cause appearing therefor;

"It Is Hereby Ordered that the motion of Duke Paoa Kahanamoku, Respondent in the above entitled proceeding for an enlargement of time within which to file a return, answer or otherwise plead to the Order to Show Cause heretofore issued in the above entitled proceeding is hereby granted; and the said Respondent is hereby allowed until 10:00 a. m. Friday March 31, 1944, to file a return, answer or otherwise plead to the Order to Show Cause. [189]

"Dated: Honolulu, T. H., this 20th day of March, 1944.

(S) DELBERT E METZGER,
Judge, United States District
Court, for the Territory of
Hawaii." [190]

From the Minutes of the United States District Court for the Territory of Hawaii
Friday, March 31, 1944

[Title of Court and Cause.]

On this day came Mr. J. Garner Anthony with Mr. James Duncan, brother of said petitioner, and

the petitioner herein, and also came Mr. Duke P. Kahanamoku, the respondent herein, with Mr. Edward J. Ennis, Assistant to the Attorney General of the United States, Mr. G. D. Crozier, United States District Attorney, and Mr. William J. Hughes, Lt. Col. Judge Advocate General's Department. This case was called for hearing on the return to the order to show cause.

Mr. Anthony offered an oral traverse to the return denying all the allegations therein and stated that a written traverse will be filed later.

Following argument by respective counsel on the issuance of the writ, the Court directed that the writ of habeas corpus issue forthwith returnable at 10:40 a. m. this day. An exception to the issuance of the writ was noted and allowed the respondent.

At 10:40 a. m., in compliance with the writ of habeas corpus, Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, Territory of Hawaii, appeared before the court with the petitioner in his custody. The Court thereupon ordered custody of the petitioner to the United States Marshal. [191]

Upon request of Mr. Anthony, the Court granted the petitioner an enlargement upon furnishing bond in the sum of $500.00.

Mr. Ennis excepted to the release of the petitioner on bond and to the amount of bond set by the Court.

Upon request of Mr. Anthony, hearing in this cause was set for Wednesday, April 5, 1944 at 9 a. m. [192]

From the Minutes of the United States District Court for the Territory of Hawaii

Wednesday, April 5, 1944

[Title of Court and Cause.]

On this day came Mr. J. Garner Anthony of the firm Robertson, Castle & Anthony, counsel for the petitioner herein, and also came Mr. Edward J. Ennis, Special Assistant to the Attorney General of the United States, Mr. G. D. Crozier, United States District Attorney, and Mr. William J. Hughes, Lt. Col. Judge Advocate General's Department, and Mr. Eugene V. Slattery, Lt. Col. Office of the Military Governor. This case was called for hearing.

Mr. Lloyd Clifford Duncan, petitioner herein, was called and sworn and testified on his own behalf.

At 11:42 a. m. Mr. Riley H. Allen, Editor, Honolulu Star-Bulletin, was called and sworn and testified on behalf of the petitioner.

Folder and contents were marked for identification as Petitioner's Exhibit #1.

At 12:04 p. m., Mr. Harry Steiner, Judge, District Court of Honolulu, was called and sworn and testified on behalf of the petitioner.

At 12:20 p. m., Mr. Albert M. Cristy, Second Judge Circuit Court, First Judicial Circuit, was called and sworn and testified on behalf of the petitioner.

At 12:38 p. m., the Court ordered that this case be continued to April 6, 1944 at 9 a. m. for further hearing. [193]

From the Minutes of the United States District Court for the Territory of Hawaii
Thursday, April 6, 1944

[Title of Court and Cause.]

On this day came Mr. J. Garner Anthony of the firm of Robertson, Castle & Anthony, with Lloyd C. Duncan, the petitioner herein, and also came Mr. Edward J. Ennis, Special Assistant to the Attorney General of the United States, Mr. G. D. Crozier, United States District Attorney, and Mr. William J. Hughes, Lt. Col. Judge Advocate General's Department, and Mr. Eugene V. Slattery, Lt. Col. Office of the Military Governor. This case was called for further hearing.

Series of communiques issued by Admiral Nimitz for the period from June 4, 1942 to March 30, 1944, were admitted in evidence as Petitioner's Exhibit "A," marked and ordered filed.

Statement by Admiral Halsey appearing in the Army & Navy Register under date of January 22, 1944 inviting the Japanese fleet to come out and fight was admitted in evidence as Exhibit "B," marked and ordered filed.

Speech by General Arnold under date of January 17, 1943, covering spearheads driven into Japanese Pacific Defense, was admitted in evidence as Petitioner's Exhibit "C," marked and ordered filed.

Quotations by the War Department giving its present plan of accepting citizens of Japanese ancestry under the selective service draft was admit-

ted in evidence as Petitioner's Exhibit "D," marked and ordered filed. [194]

Statement by Lt. Gen. Richardson appearing in the Army & Navy Journal, naming Hawaii as the Fortress of the Pacific, was admitted in evidence as Petitioner's Exhibit "E," marked and ordered filed.

Article appearing in the Army & Navy Journal under date of December 15, 1943, with reference to statements made by both Admiral Halsey and the Secretary of Navy inquiring as to the whereabouts of the Japanese fleet, was admitted in evidence as Petitioner's Exhibit "F," marked and ordered filed.

Article appearing in the Army & Navy Register under date of March 4, 1944, by Maj. Gen. Hale, Commander of the 7th Air Force, giving the progress of the war in the Central Pacific Area and with a statement to the effect that imminent danger of invasion was not lifted until after the Battle of Midway, was admitted in evidence as Petitioner's Exhibit "G," marked and ordered filed.

Mr. Gus K. Sproat, Clerk, Supreme Court of Hawaii, was called and sworn and testified on behalf of the petitioner.

A report of cases handled by both the Supreme Court and Circuit Courts of Hawaii was admitted in evidence as Petitioner's Exhibit "H," marked and ordered filed. This report covered the period 1939 to 1943.

Memorandum issued by the Hawaiian Department to troops of Central Pacific Area with reference to military dress, sidearms, gas masks, saluting,

etc., was admitted in evidence as Petitioner's Exhibit "I," marked and ordered filed.

Copy of letter dated April 30, 1943, from Galen M. Fisher to Chas. F. Loomis, was admitted in evidence as Petitioner's Exhibit "J-1," marked and ordered filed. [195]

Copy of letter dated May 12, 1943, from W. A. Gabrielson to Chas. F. Loomis, was admitted in evidence as Petitioner's Exhibit "J-2," marked and ordered filed.

Copy of letter dated May 17, 1943, from Kendall J. Fielder to Chas. F. Loomis, was admitted in evidence as Petitioner's Exhibit "J-3," marked and ordered filed.

Copy of letter dated April 4, 1944, from Ralph C. Scott to Garner Anthony, covering war risk rates in Hawaii, was admitted in evidence as Petitioner's Exhibit "K," marked and ordered filed.

Comparative Statement of gross income and consumption tax collections and tax base for the calendar years 1941, 1942, and 1943, was admitted in evidence as Petitioner's Exhibit "L," marked and ordered filed.

Volume containing regulations issued by the Governor of Hawaii under the Hawaii Defense Act was admitted in evidence as Petitioner's Exhibit "M," marked and ordered filed.

At 10:23 a. m., Lloyd C. Duncan was recalled to the witness stand and gave further testimony.

Mr. James Woodrow Duncan, brother of said petitioner, was called and sworn and testified on behalf of the petitioner.

Signed statement by three witnesses who claimed to have been present during the argument between the petitioner and two marines was marked for identification as Petitioner's #2; the offer in evidence was denied by the Court. [196]

At 1:30 p. m., Mr. Robert Weities, merchant seaman, was called and sworn and testified on behalf of the petitioner.

Mr. Columbus Matsler, merchant seaman, was called and sworn and testified on behalf of the petitioner.

Newspaper clipping from the Honolulu Star-Bulletin under date of January 1, 1943, containing statement of Lt. Gen. Emmons, and newspaper clipping from the Honolulu Star-Bulletin under date of July 5, 1943, containing statement of Lt. Gen. Richardson, was admitted in evidence as Petitioner's Exhibit "N-1," marked and ordered filed.

Newspaper clipping from the Honolulu Star-Bulletin under date of June 7, 1943, containing statement of Lt. Gen. Richardson, was admitted in evidence as Petitioner's Exhibit "N-2," marked and ordered filed.

Newspaper clipping from the Honolulu Star-Bulletin under date of February 4, 1944, containing Proclamation of C. W. Nimitz, Admiral, United States Navy, Military Governor of the Marshall Islands, was admitted in evidence as Petitioner's Exhibit "N-3," marked and ordered filed.

Newspaper clipping from the Honolulu Star-Bulletin under date of July 15, 1943, containing an address by Lt. Gen. Richardson to the Honolulu

Chamber of Commerce, was admitted in evidence as Petitioner's Exhibit "N-4," marked and ordered filed.

Newspaper clipping from the Honolulu Star-Bulletin under date of May 27, 1943, containing a statement by Lt. Gen. Emmons, was admitted in evidence as Petitioner's Exhibit "N-5," marked and ordered filed. [197]

Newspaper clipping from the Honolulu Advertiser under date of April 2, 1944, containing a statement by Secretary of Navy Frank Knox, was admitted in evidence as Petitioner's Exhibit "N-6," marked and ordered filed.

The foregoing exhibits admitted in evidence as Petitioner's Exhibits "N-1," to "N-6," inclusive, were a part of Petitioner's #1, heretofore marked for identification.

At 2:55 p. m., Mr. David G. Melville, Employee Pearl Harbor, was called and sworn and testified on behalf of the petitioner.

At 3:04 p. m., Mr. Anthony stated that he is prepared to rest his case with the exception of taking testimony of the Governor of Hawaii.

Alice Campbell Thompson, recorder, Pearl Harbor Navy Yard, was called and sworn and testified on behalf of the respondent.

Transcript of proceedings of the trial of petitioner before the Provost Court was marked for identification as Respondent's No. 1, and was admitted in evidence as Respondent's Exhibit #1, marked and ordered filed.

Shorthand notes on the arraignment of petitioner was admitted in evidence as Respondent's Exhibit #2, marked and ordered filed.

Shorthand notes on the trial of petitioner was admitted in evidence as Respondent's Exhibit #3, marked and ordered filed.

Corp. Robert C. Bowerman, United States Marine Corps, Reserve, was called and sworn and testified on behalf of the respondent.

Newspaper clipping from the Honolulu Advertiser under date of April 6, 1944, containing a statement by Gen. Emmons, Commander of the Western Defense Command, was admitted in evidence as Respondent's Exhibit #4, marked and ordered filed.

At 4:17 p. m., the Court ordered that this case be continued for further hearing to Friday, April 7, 1944 at 9 a. m. [198]

From the Minutes of the United States District Court for the Territory of Hawaii
Friday, April 7, 1944

[Title of Court and Cause.]

On this day came Mr. J. Garner Anthony of the firm of Robertson, Castle & Anthony, with Lloyd C. Duncan, the petitioner herein, and also came Mr. Edward J. Ennis, Special Assistant to the Attorney General of the United States, Mr. G. D. Crozier, United States District Attorney, and Mr. William J. Hughes, Lt. Col. Judge Advocate General's Department, and Mr. Eugene V. Slattery, Lt. Col.

Office of the Military Governor. This case was called for further hearing.

Mr. Ingram M. Stainback, Governor of Hawaii, was called and sworn and testified on behalf of the petitioner.

At 9:44 a. m., upon request of Mr. Ennis, the Governor was made a witness for the respondent.

Photostatic copy of draft of letter from the Secretary of War, Attorney General, and Secretary of Interior, to the President, photostatic copy of letter of the President's reply thereto, together with copy of the proposed proclamation, one by the Governor of Hawaii and one by General Emmons, covering the restoration of civil authority in the Territory of Hawaii, was marked for identification as Respondent's No. 5; and later admitted in evidence as Respondent's Exhibit #5-1, marked and ordered filed.

Photostatic copy of a letter dated February 1, 1943 to Secretary Stimson from the President bearing a typewritten signature, and photostatic copy of a letter dated January 18, 1943, to the President bearing the actual signatures of the Secretary of War, Attorney General, and the Secretary of the Interior, and annexed [199] thereto, copy of the proposed proclamation, one by the Governor of Hawaii and one by General Emmons, covering the restoration of civil authority in the Territory of Hawaii, was marked for identification as Respondent's No. 6; and later admitted in evidence as Respondent's Exhibit #5-2, marked and ordered filed.

Photostatic copy of the letter from the President to the Secretary of War, dated February 1, 1943, covering the restoration of civil authority in Hawaii, was marked for identification as Respondent's No. 7; and later admitted in evidence as Respondent's Exhibit #5-3, marked and ordered filed.

Photostatic copy of agreed draft of a letter from the Governor of Hawaii to General Emmons, dated January 18, 1943, covering the restoration of civil authority in Hawaii, was marked for identification as Respondent's No. 8; and later admitted in evidence as Respondent's Exhibit #5-4, marked and ordered filed.

At 10:20 a. m., cross-examination of the Governor of Hawaii was resumed by Mr. Ennis.

Mr. Robert Roan, Civil Police Officer, Navy Yard, Pearl Harbor, was called and sworn and testified on behalf of the respondent.

Mr. James C. Hunter, sentry, Main Gate, Navy Yard, Pearl Harbor, was called and sworn and testified on behalf of the respondent.

Mr. Gene A. Trini, legal aide, Provost Court, Pearl Harbor, was called and sworn and testified on behalf of the respondent.

Mr. J. Frank Wickhem, Captain, U. S. Army, Legal Advisor, Provost Court Commissioner Office of the Military Governor, was called [200] and sworn and testified on behalf of the respondent.

Summary of cases in Provost Court for the Month of February, 1944, was admitted in evidence as Respondent's Exhibit #6, marked and ordered filed.

Mr. Arthur L. Mundo, Lieutenant Commander, U. S. Navy, Provost Court Judge, Pearl Harbor, was called and sworn and testified on behalf of the respondent.

At 11:25 a. m., the Court ordered that this case be continued for further hearing to Saturday, April 8, 1944 at 9 a. m. [201]

From the Minutes of the United States District Court for the Territory of Hawaii
Saturday, April 8, 1944

[Title of Court and Cause.]

On this day came Mr. J. Garner Anthony of the firm of Robertson, Castle & Anthony, with Lloyd C. Duncan, the petitioner herein, and also came Mr. Edward J. Ennis, Special Assistant to the Attorney General of the United States, Mr. G. D. Crozier, United States District Attorney, and Mr. William J. Hughes, Lt. Col. Judge Advocate General's Department, and Mr. Eugene V. Slattery, Lt. Col. Office of the Military Governor. This case was called for further hearing.

Statistics of population estimated for the Territory of Hawaii prepared by the Bureau of Vital Statistics at Honolulu, for the period from July 1, 1943 to July 1, 1944, was admitted in evidence as Respondent's Exhibit #7, marked and ordered filed.

Mr. Andrew S. Wong, United States Army Officer, was called and sworn and testified on behalf of the respondent.

Report covering the number of births of persons

of Japanese Ancestry registered with the Japanese Consulate in Hawaii and with the Bureau of Vital Statistics of the Territory of Hawaii was marked for identification as Respondent's No. 8; and later admitted in evidence as Respondent's Exhibit #8, marked and ordered filed. [202]

Memorandum containing figures on the estimtae of dual citizens of Japanese ancestry in the Territory of Hawaii as of July 1, 1941, was marked for identification as Respondent's No. 9; and later admitted in evidence as Respondent's Exhibit #9, marked and ordered filed.

Mr. Robert K. Murakami, Attorney-at-Law, was called and sworn and tc ified on behalf of the respondent.

Translation of Japanese law on Japanese citizenship of persons of Japanese ancestry born outside of Japan was marked for identification as Respondent's No. 10; and later admitted in evidence as Respondent's Exhibit #10, marked and ordered filed.

Mr. J. Frank Wickhem, Captain, United States Army, was recalled to the witness stand by Mr. Anthony and gave further evidence in this case.

At 10:37 a. m., the Court ordered that this case be continued to Tuesday, April 11, 1944, at 9 a. m. for further hearing. [203]

From the Minutes of the United States District Court for the Territory of Hawaii
Tuesday, April 11, 1944

[Title of Court and Cause.]

On this day came Mr. J. Garner Anthony of the firm of Robertson, Castle & Anthony, with Lloyd C. Duncan, the petitioner herein, and also came Mr. Edward J. Ennis, Special Assistant to the Attorney General of the United States, Mr. G. D. Crozier, United States District Attorney, and Mr. William J. Hughes, Lt. Col. Judge Advocate General's Department, and Mr. Eugene V. Slattery, Lt. Col. Office of the Military Governor. This case was called for further hearing,

Mr. Robert C. Richardson, Lt. Gen. United States Army, Commanding General, Central Pacific Area, was called and sworn and testified on behalf of the respondent.

Article appearing in the Honolulu Star-Bulletin under date of November 13, 1943, written by Eugene Burns, Associated Press War Correspondent, on his interview with military experts including Gen. Richardson on the possibility of a second attack on Pearl Harbor, was admitted in evidence as Respondent's Exhibit #11-a, marked and ordered filed.

Newspaper clipping from The Sunday Star under date of November 13, 1943, containing an article in which Gen. Richardson is quoted as saying that he believes another attack by the Japanese on Pearl Harbor is likely to occur within the next four months, was admitted in evidence as Respondent's Exhibit #11-B, marked and ordered filed. [204]

At 11:05 a. m., Mr. Chester W. Nimitz, Admiral, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Areas, was called and sworn and testified on behalf of the respondent.

Map and legend, showing Central Pacific Area with defense and attack areas, was admitted in evidence as Respondent's Exhibit #12, marked and ordered filed.

At 11:40 a. m., Mr. Robert K. Murakami was recalled to the witness stand and gave further evidence in this case.

Mr. Shunzo Sakamaki, Assistant Professor of History, University of Hawaii, was called and sworn and testified on behalf of the respondent.

Text book on Nationality Law by Flournay & Hudson was admitted in evidence as Petitioner's Exhibit "O," marked and ordered filed.

Copy of the petition to the Secretary of State by citizens of Japanese ancestry requesting that steps be taken to negotiate with the Japanese government for a simplified procedure of expatriation by American-Japanese with that government was admitted in evidence as Petitioner's Exhibit "P," marked and ordered filed.

Treasurer's report of donations received for the campaign fund relative to the petition marked as Petitioner's Exhibit "P" was admitted in evidence as Petitioner's Exhibit "Q," marked and ordered filed.

Copy of General Orders No. 31, Office of the Military Governor of Hawaii, dated August 25, 1943,

was admitted in evidence as Petitioner's Exhibit "R," marked and ordered filed. [205]

Copy of General Orders No. 38, Office of the Military Governor of Hawaii, dated October 14, 1943, was admitted in evidence as Respondent's Exhibit #13, marked and ordered filed.

Copy of "The Volunteer" was admitted in evidence as Petitioner's Exhibit "S," marked and ordered filed.

Newspaper clippings from the Honolulu Star-Bulletin under date of March 10, 1943, containing an address by Admiral Nimitz, and under date of January 1, 1943, containing an interview with General Emmons by Frank H. Bartholomew, United Press Agent, on the defense of Hawaii, were admitted in evidence as Petitioner's Exhibit "T-1," marked and ordered filed.

Newspaper clippings from the Honolulu Star-Bulletin under dates of June 7, 1943 and December 7, 1943, containing statements by Admiral Nimitz, were admitted in evidence as Petitioner's Exhibit "T-2," marked and ordered filed.

Newspaper clippings from the Honolulu Star-Bulletin under date of January 27, 1944 and from the Honolulu Advertiser under date of January 19, 1944, containing statement by Rear Admiral Robert B. Carney, Chief of Staff to Admiral Halsey, on the progress of the naval attack on Rabaul, Kavieng, and Nauru, were admitted in evidence as Petitioner's Exhibit "T-3," marked and ordered filed.

Newspaper clipping from the Honolulu Advertiser under date of February 4, 1944, containing

statement of Undersecretary of War Robert Patterson, with reference to the battle for the Marshall Islands, was admitted in evidence as Petitioner's Exhibit "T-4," marked and ordered filed. [206]

Memorandum to Col. Wm. R. C. Morrison by Lt. Angus M. Taylor, Jr. covering the number of American-Japanese now serving in the United States Army, number of Japanese interned in Hawaii and evacuated to the mainland for internment, number of Japanese employed on military and naval projects, and the work performed by petitioner during his imprisonment was admitted in evidence as Petitioner's Exhibit "U," marked and ordered filed.

The Navy's Report dated December 5, 1942 on Pearl Harbor damages caused by Japanese attack on December 7, 1941, together with photographs showing such damage, was admitted in evidence as Respondent's Exhibit #14, marked and ordered filed.

Report of Japanese interned in the Territory of Hawaii from December 7, 1941 to April 10, 1944, was admitted in evidence as Respondent's Exhibit #15, marked and ordered filed.

At 12:30 p. m., both sides having rested their case, the Court ordered that this case be continued to Wednesday, April 12, 1944 at 9 a. m. for argument. [207]

From the Minutes of the United States District Court for the Territory of Hawaii

Wednesday, April 12, 1944

[Title of Court and Cause.]

On this day came Mr. J. Garner Anthony of the firm of Robertson, Castle & Anthony, with Lloyd C. Duncan, the petitioner herein, and also came Mr. Edward J. Ennis, Special Assistant to the Attorney General of the United States, Mr. G. D. Crozier, United States District Attorney, Mr. William J. Hughes, Lt. Col. Judge Advocate General's Department, and Mr. Eugene V. Slattery, Lt. Col. Office of the Military Governor. This case was called for argument.

At 9:05 a. m., argument was had by Mr. Anthony.

At 10:17 a. m., argument was had by Mr. Ennis, who moved to dismiss the application for a writ of habeas Corpus, which motion was overruled by the Court and an exception allowed the respondent.

At 11:50 a. m., Mr. Anthony made his closing argument.

At 12:10 p. m., the Court stated that he would take this matter under consideration and will endeavor to render his decision by Thursday noon, April 13, 1944. [208]

From the Minutes of the United States District Court for the Territory of Hawaii
Thursday, April 20, 1944

[Title of Court and Cause.]

On this day came Mr. J. Garner Anthony, counsel for the petitioner herein, and also came Mr. Edward J. Ennis, Special Assistant to the Attorney General of the United States. This case was called for the purpose of introducing further evidence, entry of judgment, and giving notice of appeal.

Copy of General Orders No. 1 to No. 181, inclusive, issued by order of the Military Governor of Hawaii, covering the period from December 11, 1941 to January 30, 1943, inclusive, was offered by Mr. Anthony, and admitted in evidence by the Court as Petitioner's Exhibit "V," marked and ordered filed, there being no objection by Mr. Ennis to the introduction of said exhibit.

Copy of Provost Court Proceedings in the case of Lloyd Clifford Duncan, giving the violation committed by him and the sentence imposed upon him by the Provost Court, was offered by Mr. Ennis and admitted in evidence by the Court as Respondent's Exhibit #16, marked and ordered filed, there being no objection by Mr. Anthony to the introduction of said exhibit.

Copy of Penal Summons of Provost Court at Pearl Harbor, T. H. to Lloyd Clifford Duncan was offered by Mr. Ennis and admitted in evidence by the Court as Respondent's Exhibit #17, marked and ordered filed, there being no objection by Mr. Anthony to the introduction of said exhibit. [209]

Copy of Mittimus issued by the Provost Court, Pearl Harbor, T. H. for the imprisonment of Lloyd Clifford Duncan was offered by Mr. Ennis and admitted in evidence by the Court as Respondent's Exhibit #18, marked and ordered filed, there being no objection by Mr. Anthony to the introduction of said exhibit.

Mr. Ennis then requested that the Court direct the court reporter to file with the Clerk of Court as soon as possible a transcript of the entire proceedings held in this case.

It was stipulated by respective counsel that Petitioner's Exhibit "1", containing orders to troops of the Hawaiian Department, discloses that for a period of six months immediately after December 7, 1941, strict orders were given service personnel in regard to the carrying of gas masks, side arms, and issuance of passes; that after June 1942 there was a gradual relaxation of these regulations up to the date of the filing of the petition; that for a long period prior to the filing of the petition, the carrying of gas masks and side arms was discontinued.

Exceptions to Findings and Conclusions were presented to the Court, was thereafter allowed by the Court and ordered to be placed on file.

Form of Judgment was presented to the Court, was thereafter signed and ordered to be placed on file.

Order on Taking Appeal, signed by the Judges of this court, which suspended, for the purpose of perfecting [210] the appeal in this cause, the operation of Rules No. 124 and No. 126 of this court, was

presented to the Court and ordered to be placed on file.

Notice of Appeal was presented to the Court, allowed, and ordered to be placed on file; copy of same was served on Mr. Anthony.

The Judgment reads as follows:

[Judgment set out previously at page 403.]

The Order on Taking Appeal reads as follows:

[Order on Taking Appeal set out previously at page 405.] [211]

From the Minutes of the United States District Court for the Territory of Hawaii

Thursday, April 27, 1944

[Title of Court and Cause.]

On this day came the petitioner herein with Mr. J. Garner Anthony, his counsel, and also came Mr. G. D. Crozier and Mr. Edward A. Towse, United States District Attorney and Assistant United States District Attorney, respectively, for the respondent herein. This case was called for the purpose of placing petitioner on his own personal recognizance pending appeal.

Mr. Anthony informed the Court and the United States Attorney that petitioner, a skilled mechanic, had been repeatedly refused permission to return to his work at the Navy Yard at Pearl Harbor by the authorities there since his release from imprisonment; that the naval authorities at Pearl Harbor have offered to transfer him to the Navy Yard at

Mare Island; and that the Court may make such order as it deems appropriate under the circumstances.

The Court then ordered that petitioner file his personal recognizance without surety and the cash bond on deposit be cancelled and returned to the surety. [213]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS [214]

The above-entitled matter was held in the Judge's Chamber, U. S. District Court, Honolulu, Territory of Hawaii on March 14, 1944, at 2:05 o'clock p.m., Before

Hon. J. Frank McLaughlin, Judge.

Present:

G. D. Crozier, Esq.,
U. S. District Attorney;
Edward Towse, Esq.,
Assistant District Attorney;
J. Garner Anthony, Esq.,
of Robertson, Castle & Anthony;
C. Nils Tavares, Esq.,
Attorney General;
Frank Wickhem, Captain,
U. S. Army;
Eugene V. Slattery, Lieutenant-Colonel,
U. S. Army;
James Duncan, Esq.,
Brother of the Petitioner.

Federal Building,
Honolulu, T. H. [215]

PROCEEDINGS

The Clerk: Habeas Corpus No. 298, in the matter of the application of Lloyd C. Duncan for a writ of Habeas Corpus.

The Court: Very well. This matter, according to the record, was noticed for presentation to the Court at 2:00 this afternoon, and it is now 2:05 by my chamber's clock; and, as is customary in the presentations of petitions of this sort, they are presented in the chambers.

The record may show the presence of Mr. Anthony, of the firm of Robertson, Castle and Anthony, representing the Petitioner. He has with him a gentleman by the name of James Duncan.

Mr. Anthony: He is a brother of the Petitioner.

The Court: Mr. Crozier, U. S. Attorney; Mr. Towse, Assistant; Captain Wickhem, Commissioner of the Provost Court; and Colonel Slattery, of the Legal Division of the Office of the Military Governor; Mrs. Hollingsworth, of the Star-Bulletin; and —excuse me—Mr. Tavares, Attorney General of the Territory.

Mr. Tavares: Also as an observer, your Honor, for the time being.

The Court: All right.

Mr. Anthony: I don't know whether your Honor has had an opportunity to examine the application.

The Court: I have read it hurriedly.

Mr. Anthony: This application discloses that the Petitioner here, a citizen of the United States who is presently employed as a civilian worker at Pearl

Harbor, on or about the 24th of February was going down to his [216] work on the Naval reservation when he was accosted by the marine sentry at the gate and thereafter placed under arrest. He was then taken in custody, as disclosed by the petition, and retained in custody of the civil police until the following day, when he was discharged.

Several days later the Petitioner was served with a charge in what is styled a Provost Court at Pearl Harbor, City and County of Honolulu. Copy of the charge is attached to the petition.

The petition also discloses that the Petitioner was not represented by counsel; that at the conclusion of the trial, which occurred on March 2nd, he was sentenced to six months in the county jail by a Provost Court Judge, Arthur L. Mundo, Lieutenant Commander U. S. Navy, retired; and that thereafter a mittimus was issued by that individual, which was addressed to the high sheriff of the Territory of Hawaii, or to his deputy, or the sheriff of the City and County of Honolulu, which commanded the sheriff to take the Petitioner in custody pursuant to the trial had, as stated above; and that this petitioner is now restrained of his liberty in the city and county jail.

Under a color of authority of the United States of America, the complaint sets forth that this man has not been afforded a trial which he is entitled to under the Constitution and laws of the United States; that there is no justification for the trial of an assault and battery case involving a civilian defendant before a provost court; and that that de-

prives the Petitioner of his Constitutional rights of a trial by jury.

Under the judicial code, I think the Petitioner is entitled to have the writ issue. [217]

The Court: Mr. Anthony, I presume that you are familiar with the rules of this Court, and did you, as required by Rule 122, present this petition to the U. S. Attorney at least an hour before presenting it to the Court?

Mr. Anthony: Yes, your Honor, that was presented at, I believe, around 11:30 this morning to the U. S. Attorney.

The Court: Is there any question as to that, Mr. Crozier?

Mr. Crozier: No question of that as a fact, if the Court please—some time between 11:30 and 12.

The Court: Further, you pray on the basis of these allegations for the issuance of a writ, and, as you are well aware, there is a conflict between the statutes of the United States and the rules of this Court. I refer particularly to 28 U.S.C., section——

Mr. Anthony: 459.

The Court: This is the one that says, upon application, unless the Court for some reason decides otherwise, the writ shall issue forthwith.

Mr. Anthony: Section 455, your Honor.

The Court: Section 455, Title 28.

Mr. Anthony: The Court or Justice or ~~Judge~~ to whom such application is made, shall forthwith award a writ of habeas corpus unless it appears

from the petition itself that the party is not entitled thereto.

The Court: Similarly, the subject is covered by Rule 123-a of this Court, adopted August 29, 1913. I presume you are familiar with that wording, which says:

> "Excepting in cases of emergency, or where in the judgment of the court or judge before whom the application shall be made the circumstances shall [218] otherwise require, the writ of habeas corpus shall not issue until after an order to show cause shall have been made and a hearing had upon the petition and the return to the order to show cause."

Despite this rule of the Court, your petition, as I understand the wording of the petition on behalf of your client, is for immediate issuance of the writ.

Mr. Anthony: In accordance with the judicial code.

The Court: Which reminds me—you are aware, too, are you not, that currently Judge Metzger has the civil calendar, so that technically this should be before Judge Metzger.

Mr. Anthony: I don't think that makes any difference in the power of the Court, your Honor. I understood the calendar had changed; that's why I brought it over here.

The Court: The calendar does not change until April 10th. However, Judge Metzger is not present. After you telephoned at 11:30 to state that you wished an appointment this afternoon for the purpose of presenting a petition for a writ, this

Court, not thinking at the moment that it was on Judge Metzger's calendar, gave you the appointment. A few seconds after, it realized it was on Judge Metzger's calendar, that is, it properly belonged there; and I telephoned to Judge Metzger and acquainted him with the facts, that you had called requesting such an appointment. And he indicated to me that he would like me to handle it today, at least, at 2 o'clock. If there are further proceedings than those which occur this afternoon, the case will be transferred to Judge Metzger or remain with this branch of the Court. That remains to be seen.

Mr. Anthony: That is satisfactory, your Honor.

[219]

The Court: Mr. Crozier, am I to infer that you are resisting the petition? In other words, have you anything that you wish to say?

Mr. Crozier: Yes, if the Court please, specially on behalf of the United States.

The Court: Make sure that gets into the record, that the U. S. Attorney appears specially on behalf of the United States.

Mr. Crozier: Here is paragraph six of the petition:

> "That petitioner is now unlawfully imprisoned under color of authority of the United States—".

It is apparent, if the Court please, that the United States is interested in the result of the proceeding, and that also may be said from the remarks of the

Court and of Counsel for the Petitioner. It is the position of the special appearance made here—an opportunity which, I believe, is available here and is the reason for the notice as prescribed by the rule of Court—to urge upon the Court the issuance of an order to show cause where the writ prayed for in this proceeding should or should not be granted.

I call your Honor's attention to that which your Honor has already pointed out, Rule 123-A of this Court, which reads verbatim:

> "Excepting in cases of emergency, or where in the judgment of the court or judge before whom the application shall be made the circumstances shall otherwise require, the writ of habeas corpus shall not issue until after an order to show cause shall have been made and a hearing had upon the petition and the return to the order to show cause."

And, if your Honor please, the Court I believe is well aware of the case of Walker vs. Johnston, decided by the Supreme Court of the United States.

[220]

The Court: Citation, please?

Mr. Crozier: On February 10, 1941. The citation is 312 United States Reports, page 275,——

The Court: Yes.

Mr. Crozier: Where on page 284, if the Court please, it states:

> "It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to

issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner, and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as a matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute."

If the Court please, our position is that we urge upon the Court the expediency, the desirability, the advisability of your Honor issuing process in the form of an order to show cause as to why the writ should or should not be granted upon the petitioner.

The Court: By what token—and I have dis-

cussed this with you before in the recent Batchelor habeas corpus case—by what authority does the Supreme Court, and this Court, undertake to flaunt the expressed wording of the Congress as embodied in 28 U.S.C., Section 455, where they do not [221] leave the matter to grave doubt but on the contrary say that the writ shall forthwith be awarded unless it appears that the party is not entitled to it?

Mr. Crozier: It is the issue that your Honor just touched upon, if the Court please, to determine in a preliminary way whether it appears from the petition itself that the party is not entitled to it, that the order to show cause procedure has developed. It is for your Honor's discretion, and it is in addition to all that the statute requires.

The Court: Yes, it would be.

Mr. Crozier: It would be in addition to all that the statute requires, and it is stated that the Petitioner, the prisoner, is deprived of no rights whatsoever.

Mr. Anthony: Except that he's in jail. That's all. I can explain how that grew up.

Mr. Crozier: Now, there is a further thought, if the Court please. I believe I am correct in this. If the writ does issue, this particular prisoner within your Honor's judicial knowledge being within 20 miles from the site of this Court, it is mandatory that——

The Court: The return be within three days.

Mr. Crozier: That the return be within three days. Now, taking the reading of the petition by Counsel, it is quite apparent, if the Court please,

that there is a fundamental issue involved in this proceeding. We urge, if it cannot be satisfactorily prepared for the Court's consideration, or determined by the Court in the course of a 3-day period——

The Court: Well, that 3-day period is the return date. [222]

Mr. Crozier: If your Honor were to issue a writ at this moment, the return would have to be three days hence. I take it after that your Honor could order a hearing on some day thereafter.

The Court: That's right.

Mr. Crozier: Nevertheless, if the Court please, I submit that the procedure as followed by the Supreme Court of the United States, and the lower courts, according to the case of Walker vs. Johnston, is the proper and expedient process to issue in this proceeding.

The Court: Of course, we have had conflicting precedents within our own Court; the most recent habeas corpus proceeding, the Batchelor case—in that case an order to show cause was issued and later the writ was issued.

Mr. Crozier: That is correct, if the Court please.

The Court: And prior to that, the next habeas corpus case—looking backward in point of time—was the famous case, or rather two habeas corpus cases; the Glockner and Seifert cases, in both of which the Court followed a statute and ignored its own rule as well as the dictum of the Supreme Court. So that in a way, based on precedent, it

more or less leaves this Court free to do as it pleases at present.

Mr. Crozier: I believe that is the Court's power in any event, if the Court please. There is another distinction.

The Court: Of course, in fairness I should add that in back of that to which I have referred in point of time, is a rather long history of Rule 123-a having been observed since its adoption in 1913.

Mr. Crozier: That is only my general knowledge, if [223] the Court please——

The Court: Well, having had, some years ago, some contact with immigration cases, I can speak on that as one having a bit of knowledge; but I can, of course, take judicial notice of the records in this Court. I interrupted you. Go ahead.

Mr. Crozier: There is one further consideration, if the Court please, that we'd like to urge. And I believe I am correct in this observation, in the event the Court issues process in the form of a writ, and then upon return day sets a hearing on it thereafter, that hearing will take the form of a trial, if the Court please, with evidence?

The Court: If there is an issue of fact.

Mr. Crozier: If there is an issue of fact. However, if the Court elects to issue an order to show cause at the outset, the matter, as stated in the authority which I cited to your Honor, is determined on the application, return and post-traverse, unless there be a contradiction on the question of fact.

The Court: I am familiar with the two methods

of proceeding, and I think you know from the test to which I put you to and through in the Batchelor case that I personally think that this order to show cause procedure frequently results in a merry-go-round. That is, you go round in a circle and arrive right back where you began. But regardless of what I personally think about the matter, I am faced with Rule 123-a; and I am likewise faced with the statute.

Is there anything else you'd like to say right now? Otherwise, I will call on Mr. Anthony to hear what he has to say. [224]

Mr. Crozier: Not at the moment, if the Court please.

The Court: Very well. Mr. Anthony, by virtue of what do you ask this Court to ignore its own rules?

Mr. Anthony: In the first place, your Honor, I think that the command of the act of Congress is binding. I am quite familiar with the Walker case. It is not clear from that opinion whether or not that procedure of the adoption of an order to show cause was consented to by the prisoner. But I do know what the history of that procedure is, and it is this: On the mainland of the United States, where the Federal prisoners are sometimes at considerable distance from the courtroom, and probably across state lines, it is a great inconvenience in the many habeas corpus cases that come before those Federal courts to compel the warden of the Federal prison to actually produce the body

of the prisoner in obedience to the judicial code. For that reason this technique has grown up of trying those issues where they can be tried, in some cases, upon the application of an order to show cause.

Now, I don't see that the facts here fit that situation at all. Here we have a county jail that is two or three blocks away from this courthouse. If there is anything in the Petitioner's application here, he is unlawfully restrained of his liberty, and he is going to stay in jail until this proceeding is over. If the United States were to come in here and turn the man loose on bond to this Court, that might be a different situation. But that is not the fact. The man is imprisoned. He is having his substantial rights invaded every day.

Now, despite the conflicting practice in this Court, [225] I think the clearest way to raise this issue, if it is to be raised and is to be contested, is by the issuance of the writ. And certainly your Honor cannot go wrong in following the expressed words of the judicial code, which to my way of thinking leave no room for interpretation. Beyond that, we have had the precedent of prior habeas corpus cases, recent habeas corpus cases in this Court, in which the writ has in fact issued.

Mr. Crozier says that the procedure to follow the requirement of the U.S. judicial code may result in the trial of issues of fact. My answer to that is that the same would be true if we had filed an order to show cause, applied for an order to show cause. The Sheriff of the United States wouldn't

come in here and admit the facts of the petition; he'd come in here and contest the facts alleged, I presume. I don't know. I can't contest the record facts.

The Court: On the facts of your position, Mr. Crozier, consulting 455 of Title 28 once again, let me read it:

> "The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto."

Unless it appears from the petition itself that the party is not entitled thereto—will you give me any help in construing the latter part of that sentence?

Mr. Crozier: Well that of itself, if the Court please, perhaps can't be determined on brief notice. The order to show cause performs that function, if the Court please.

The Court: It strikes me as if the statute requires the Court to make an on the spot decision. First, if it is obvious from the petition itself that it is frivolous [226] or no facts are alleged that would come close to having a meritorious basis for the issuance of a writ, that under such circumstances why, of course, the application could be properly denied. But in other circumstances Congress seems to say that the Court "shall forthwith award a writ." If we didn't have the word "forthwith" in there, I could understand perhaps this rule 125-a and the Walker vs. Johnston case. But I con-

fess that I don't know where this Court or the Supreme Court of the United States ever got to the point of assuming to the contrary to the expressed mandate of the Congress.

Confining you, Mr. Anthony, to this rule, you contend that even under this rule you are entitled to the issuance of a writ. Is there anything of an emergency nature in your case, or any facts that would, in your opinion, move the Court to do otherwise than follow the rule? I refer to those words in Rule 123-a which say:

> "Excepting in case of emergency, or where in the judgment of the court or judge before whom the application shall be made the circumstances shall otherwise require,——"

Mr. Anthony: There is nothing alleged in the petition that sets forth any emergency, your Honor. And if a detention of a man in the Honolulu jail illegally and without a valid trial, according to our contention, does not constitute cause, then there is no emergency. The man isn't sick or anything like that. He is suffering the usual privations that any prisoner would suffer being incarcerated. This man happens to claim that he has been falsely charged and falsely tried.

The Court: Of course, that is true in practically every habeas corpus case. [227]

Mr. Anthony: That is correct, your Honor.

The Court: A person being held by someone.

Mr. Anthony: That is correct. So I make no claim that this is an emergency other than any other kind of similar emergency.

Mr. Crozier: I call your attention again to Walker vs. Johnston, if the Court please, referring to the practice of the issuance of an order to show cause:

> "It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, . . ."

The Court: Well, isn't that so, Mr. Anthony, that the order of the rule of the Court would deprive the petitioner of no substantial right?

Mr. Anthony: If the Petitioner is correct, your Honor, he will be discharged from the county jail within a few days, if a writ of habeas corpus issues out of this Court. If, on the other hand, the Petitioner is obliged to go through the red tape of an order to show cause, I don't know; the U.S. Attorney might prosecute an appeal for that, from that order, in the event that the Petitioner is successful in obtaining an order to show cause. And that would mean this, that while this case went its way through the appellate courts, the prisoner would still be in jail. At least I imagine that's what it would be.

Mr. Crozier: Not necessarily, if the Court please.

Mr. Anthony: If they would be willing to release the man on bond right now, I would withdraw my application for the issuance of a writ. I haven't heard any response to that. I think it

is fair. The man will post a bond. He couldn't get off this place anyhow. He is not dangerous [228] to the peace or safety of the United States. There is no military security involved in this matter. This is an ordinary garden variety case of assault and battery.

The Court: The issues presented by the allegations are rather deep-rooted, however.

Mr. Anthony: That is correct, your Honor. It goes to the very roots of this system.

The Court: From a remark which Mr. Anthony made, I take it that he is calling on you to react to his suggestion. Do you wish to react to it in any way?

Mr. Crozier: I do not now appreciate what suggestion it was, if the Court please.

The Court: He suggested that if the Government would release the man on bond, that he would amend his petition for a writ to apply for an order to show cause, if I understood you correctly.

Mr. Anthony: That is correct, your Honor.

Mr. Crozier: I appear specially, if the Court please, for a single purpose——

Mr. Tavares: Your Honor, may I speak as a mediato——

The Court: Yes.

Mr. Tavares: Eventually, I take it, the sheriff of the city and county will be drawn into this, although he has not yet been; and through him the county and Territory will be interested at least in a collateral way. If some way could be arranged by which the suggestion of Mr. Anthony could be

followed, I think it would be very desirable because, as the Court says, these issues are very deep. I think it would be unfortunate if they were considered hastily. If possible, some method of procedure ought to be devised to give both parties time to present [229] the matter adequately to the Court.

The Court: Well, there is no one before the Court now who has any authority to pick up Mr. Anthony's suggestion. I respect Mr. Crozier's position. He is appearing specially, and he has gone into the history of other habeas corpus cases, and we all know the meaning of that, both in relation to habeas corpus matters and others of similar nature and, of course, special appearances themselves.

Is there anything else anyone wishes to say? Hearing none, I am prepared to state my reactions to the thing. My own inclination would be to follow the statute. Mr. Anthony mentioned that this petition was a garden variety of habeas corpus case. I am not inclined to agree with him, in view of the issues framed by the allegations of fact contained in the petition. I personally do not like orders to show cause procedures because, as I think anyone who has come in contact with me on such matters knows very well that, as I have said this afternoon, I think they result in a general merry-go-round.

But I am faced with a rule of our own Court, with a decision of the U. S. Supreme Court; and relying on the judgment of the Supreme Court that says that an order to show cause procedure

results in no substantial deprivation of right to the Petitioner, I am going to in this instance defer issuing a writ as prayed for, and in lieu thereof at this time to issue an order to show cause.

Mr. Anthony: When will that be made returnable, your Honor?

The Court: Well, that is the next matter for all of us to discuss. Mr. Crozier, though specially appearing, [230] do you wish to be heard on the subject?

Mr. Crozier: Well, still preserving my position as a special appearance, if the Court please, it is quite apparent from the wording of the petition, from Counsel-for-the-Petitioner's remark, and the remarks of the Court, that a very fundamental issue is involved. And I'd suggest that, in order to give a careful presentation of the return, and for the Court's aid—and perhaps this is necessary, as the Court knows—that time be allowed to perhaps contact Washington.

Mr. Anthony: May I suggest, your Honor, I don't think in any event it should be delayed any time beyond the time that the writ itself would be returnable. The writ would be returned in three days.

The Court: My recollection is that an order to show cause is usually returnable within ten days. Am I right, Mr. Clerk?

Mr. Crozier: That was the Batchelor case.

The Court: That was the Batchelor case.

Mr. Anthony: I don't think there is any time fixed by this rule.

The Court: No, not by rule but by practice. Mr. Clerk, do you happen to know what the usual time is in such instances?

Mr. Crozier: May I finish my remarks, if the Court please?

The Court: Yes.

Mr. Crozier: That a period of at least ten days be granted, with a further note, if the Court please, that I mention this for your Honor's consideration, the respondent has not appeared in the Court.

[231]

The Court: You appeared specially and have protected yourself by your appearance.

Mr. Anthony: May I suggest this, your Honor? The United States of America has had several years within which to familiarize itself with the problems involved in this case and others; and the U. S. Attorney, too. Now, the Court, over my objection, has gone with Counsel and followed a case in the Supreme Court of the United States, which gives half-way approval, a grudging approval to departing from the requirements of the act of Congress, on the basis that the Petitioner had been deprived of no substantial right. That is precisely why I ask for the issuance of a writ, because I know that that would be immediately faced with delay.

Now, I don't see any reason why they can't get their return to the order to show cause in this week. There is nothing particularly complicated about this. They have been through it before. And if your Honor is endeavoring to follow what the

Supreme Court says, i.e., not deprive the Petitioner of any substantial right, I certainly would suggest that the time be fixed this week.

The Court: Of course, in the Batchelor case the time originally allowed was ten days, and the Court extended that time in view of the representations that certain documents were needed and that they were available only in Washington, D. C. It is awfully hard to figure very closely on this thing when Mr. Crozier is appearing specially. There are certain questions I can't ask him without putting him in an awkward position. But I would think offhand that other than advice and counsel there isn't much by way of documentary evidence that would be needed [232] from Washington in a case of this sort. So far as advice and counsel are concerned, it seems that moderate facilities would permit that to be rapidly arrived at.

Mr. Crozier: Again, if the Court please—still preserving my status as special appearance—I call your Honor's attention to Section 456 of Federal 28,—

The Court: Yes?

Mr. Crozier: ——Which states as follows:

> "Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days."

It was very well and probable, as your Honor recognized in the Batchelor case, that recourse to the Capital of the Country would be necessary. I don't know. I further again point out to your Honor the lack of service of any process yet upon the Respondent or any appearance by the Counsel.

Mr. Anthony: Well, that is hardly a valid excuse, your Honor. I am ready to serve it now, if the Court signs the writ.

Mr. Crozier: And if you would make the return of the order to show cause within this week, this being a matter of an element of surprise——

The Court: Well, in terms of service of process, the only person to be served is the person to whom the writ is directed, and where the order to show cause is directed; and he appears through his attorney. In this instance we probably have the situation we had in the Batchelor case, where the Territory and the U. S. Attorney appeared jointly in the case eventually. I don't know. [233]

Mr. Crozier: It also involves the proposition of representing the Respondent.

The Clerk: Mr. Thompson has informed me that in the majority of cases it was ten days and there were a few of five days.

The Court: I think in this situation, where it does not appear to me that there is any dispute over documents, that it presents simple deep-rooted issues of law; and, as Mr. Anthony says, the Government has had over two years to reflect on these matters. It reflected to considerable extent in the

Seifert and Glockner cases. And, accordingly, I will make the order to show cause returnable on Monday, the 20th, at 10:00 a.m. Mr. Clerk, I will issue, therefore, an order to show cause directed to the Sheriff of the City and County of Honolulu, directing him to show cause on Monday, by Monday at 10:00 a.m., as to why the writ prayed for should not issue. I believe that is all.

Mr. Anthony: Thank you, your Honor.

(The hearing adjourned at 2:55 o'clock p.m.)

[234]

I, Albert Grain, Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify as follows:

That the foregoing is a true and correct transcript of stenographic notes taken by me at a hearing held before the Hon. J. Frank McLaughlin, Judge, in the matter of the application of Lloyd C. Duncan for a writ of Habeas Corpus, on the 14th day of March, 1944, at 2:05 o'clock, p.m.

S/ ALBERT GRAIN

Mar. 18, 1944. [235]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. District Court, Honolulu, Territory of Hawaii, on March 20, 1944, at 9:05 o'clock, a.m.,

Before

Hon. Delbert E. Metzger, Judge.

Appearances:

G. D. Crozier, Esq.,
U. S. District Attorney,
appearing for the Respondent;

Edward Towse, Esq.,
Assistant U. S. District Attorney,
appearing for the Respondent;

J. Garner Anthony, Esq.,
of the law firm of Robertson, Castle and Anthony.
appearing for the Petitioner.

Federal Court Building
Honolulu, T. H. [236]

PROCEEDINGS

The Clerk: Habeas Corpus No. 298, in the matter of the application of Lloyd C. Duncan for a Writ of Habeas Corpus, appearing on "Motion for an order granting enlargement of time within which to file return, answer, or otherwise plead to order to show cause."

The Court: Yes.

Mr. Crozier: If the Court please, I take it that your Honor is familiar with the motion and the affidavit attached thereto. I submit, if the Court please, that to a certain extent the motion and affidavit speak for themselves.

To refresh your Honor's knowledge of the status of this proceeding, the petition, if the Court please, was filed on March 14th at 11:35 a.m., and a brief hearing was had before his Honor, Judge McLaughlin, at two o'clock, at which time—after some discussion—Judge McLaughlin designated that 10 a.m., March 20, 1944, would be the time in which the response to the order to show cause should be made.

If the Court please, I assure the Court that no undue delay has occurred. And it is very much desired by the Respondent, and my office in representing him, and, as the motion and affidavit state, that an enlargement of time be granted within which to permit the representatives of the War Department and the Department of Justice to arrive in Hawaii and participate in the proceeding. And, if your Honor please, I call to your Honor's attention that this proceeding was brought prior to the time within which response to the order was directed by Judge McLaughlin.

I might furthermore call your Honor's attention, if the Court please, to Rule 6-B of the Rules of Civil Procedure, which reads as follows: [237]

> "Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause

shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order * * * ".

If the Court please, in view of that——

The Court: Well, that right has always been inherent in the Court. Has the Counsel for the Petitioner anything to say?

Mr. Anthony: Your Honor, no lawyer, and I am sure no court, desires to oppose a request of the chief law officer in the United States, which your Honor has before him. I would like to have some information from the U. S. Attorney, before I say what I have to say with respect to the motion. In this motion the U. S. Attorney appears for the Respondent, the Sheriff of the City and County of Honolulu, as his attorney.

I would like to know, first, whether or not there is any other counsel representing the Respondent in this proceeding. I think Mr. Crozier can answer that for me.

The second proposition I would like to have answered, and I believe I am entitled to have the information—I would like to know whether or not there has been any effort on the part of the U. S. Attorney to satisfy himself as to the request that I made at the initial proceeding. Your Honor unfortunately did not order the original order to show cause, at the time that the application was made for the issuance of a writ, believing as I did that under

the judicial code the Petitioner was entitled to it. Judge McLaughlin ruled to the contrary, pursuant to the rules of this Court, and issued an order to show cause. [238]

I could foresee at the outset that either purposely or otherwise we would be met with continual and continued delays in this proceeding, and for that very reason I suggested to the U. S. Attorney, if the Court please, that if the U. S. Attorney would release this Petitioner on bond to this Court, I would not oppose any continuance by the United States or by anybody else.

I pointed out at the hearing before Judge McLaughlin that this man is not charged with any act involving military security. He is charged with the simple case of assault and battery. And I thought in all fairness the U. S. Attorney should be willing to adopt my suggestion that the man be released upon bond pending the determination of this case.

I believe I am entitled to ask the question as to whether or not Mr. Crozier has asked the Attorney General his views in regard to the releasing of the Petitioner on bond pending the disposition of this proceeding. After I have had an answer to that, if Mr. Crozier is willing to give me an answer to it, I am prepared to say what my attitude is on this motion.

I repeat, nobody likes to oppose a request of the chief law officer of the United States, but I think I am entitled to know that.

Mr. Crozier: If the Court please, I submit that

the matters raised by Mr. Anthony are without the scope of the immediate motion, but I see no objection to answering those questions. At the moment there is no other counsel of record other than myself or my office. But, as indicated in the wire of Mr. Biddle to me, a representative of the Department of Justice is coming to participate in the proceeding. And I must say that further than that I don't [239] believe that there has been any further clarification.

Similarly on the second request of Mr. Anthony, which I submit, if the Court please, is without the scope of the consideration by the Court of this motion at this time. Yet I have no objection to answering his inquiry in that respect. If the Court please, at the hearing before Judge McLaughlin, at two o'clock on March 14th, the appearance by myself was specially in behalf of the United States, and I was in no position to consider Mr. Anthony's request in that respect. And I will state, and am perfectly free to state, that his suggestion or request has been brought to the attention of the Department of Justice and the parties concerned. At this time I am not in a position or authorized to reply to that suggestion or request, if the Court please. And I might further add, if the Court please, that not only at the request of the Attorney General of the United States was this request made for the enlargement of the time, but it is on request of myself and my office, if the Court please.

Have I, Mr. Anthony, answered your inquiries in the manner that you desired or contemplated?

Mr. Anthony: When was that wire sent to the department relative to the release of the Petitioner on bond?

Mr. Crozier: Well, I didn't state, Mr. Anthony, that it was a wire. It was definitely brought to the attention of someone in the Department of Justice. And I submit again, if the Court please, merely for clear thinking, that the two requests made by Mr. Anthony at the moment are not properly a part of the consideration. Is there any question, Mr. Anthony, of the facts as alleged in the motion?

Mr. Anthony: My purpose, your Honor, as to the first [240] request was, I thought, obvious—to ascertain whether or not the City and County Attorney had anything to do with this case. Here is a city and county official that is being brought into the Federal Court. I gather from Mr. Crozier's statement that the City and County Attorney has nothing to do with this case. He hasn't said that yet.

The other request that I made, I admit has nothing to do with this motion; but it has considerably to do with the attitude which the Petitioner takes before this Court. Having made what is conceded to be a very reasonable proposition to the U. S. Attorney, knowing full well that the U. S. Attorney would want continuances or a continuance rather, that was the purpose of my question. As I see the record, in view of the wire that is before your Honor—being a request of the Attorney-General of the United States—I don't see how the Court could do other than to grant the request.

But I would like to have it understood in making that statement, if your Honor please, and I contend that I should urge, and I will urge, the initial proposition that I made to the U. S. Attorney—I made it at the very earliest moment—that if further continuances are to be had in this proceeding, I will urge upon your Honor that this man be released on bond pending these continuances. And your Honor can see how intolerable any other situation would be. The man has already served almost a month in jail—no, 20 days. And if they should continue to apply to this Court for the extension and continuances, before the Court would get around to entertaining the cause, the case would be moot. All that the Petitioner would have left would be an action for damages against the Sheriff of the City and County of [241] Honolulu. I do not believe that the Petitioner is obliged to be subjected to that sort of proceeding.

In conclusion I say, in view of this request, I am not opposing the ten days that are here asked for.

There is one other thing I might add before closing; We have no knowledge, and I'm sure Mr. Crozier hasn't—I don't think he does—as to whether or not these individuals are on the way. I would think it would be highly unlikely that they would get here within the ten days, and that is why I again urge upon the U. S. Attorney a serious and prompt consideration of my request.

Mr. Crozier: I again state to the Court, if the Court please, that there has been no delay occurring since this proceeding came to the notice of the

U. S. Attorney's office. There has been no intent in any respect, if the Court please, to delay the proceeding. Out of courtesy to Mr. Anthony, in answer to his last inquiry—again on the question which is primarily within the scope of the Court's consideration at the moment—I cannot state as a fact that these representatives have left Washington. But I believe the expectation is, if the Court please, that they will be here well within the expiration of the ten days' period.

The Court: Well, you make no answer to Mr. Anthony's proposition. At this time, at this stage of the proceedings, the Court doesn't feel empowered to direct that this man be released on bond, but it certainly impresses the Court as being the proper thing to do. If the Court is to grant continuances upon an order to show cause as to why a writ of habeas corpus should not be issued after a petition has been duly presented to the Court some several days ago, I feel very reluctant about granting this motion. Some six days [242] have gone by from the time of the presentation of the petition before we get this motion for an extension of time for a hearing on the order to show cause. I feel as Mr. Anthony has expressed, that if we string the thing along far enough it will become moot, and that is not this Court's idea of dealing with a petition for a writ of habeas corpus. It isn't at all in line with the notions the Court has held for many years as to the manner of handling a petition for a writ of habeas corpus. It doesn't

seem to me to be in line with the clear statutes on the subject.

Do you believe that there is any manner in which your office can work out an agreement with the Counsel for the Petitioner so that the man may be released pending the hearing of his case, on a substantial bail bond?

Mr. Crozier: If the Court please, I don't believe I can properly comment on that at the moment. I do wish to say, however, that in all sincerity, as far as my office is concerned, there will be no further continuances made in the absence of the necessity therefor. Upon your Honor's original question, I can't state at the moment that I can give the Court any assurance that we can take a position in that respect.

The Court: Well, you don't feel inclined to move that way, I take it.

Mr. Crozier: That, if the Court please, is a matter that I don't believe I should properly discuss at the moment, as the participation of the Government in this matter is perhaps not as fully clarified as it may soon become. I feel that that is a matter that is not proper for consideration at this moment.

The Court: You can probably realize that the matter [243] of practice before the Court, particularly in a matter of habeas corpus, practiced by remote control is not very impressive. The Court, I, don't like it.

Mr. Anthony: Your Honor, there is one other thing that I'd like to have distinctly understood.

I omitted it in the beginning. The writ has not issued in this case; only an order to show cause. And I think we should have the assurance of the Respondent here that the prisoner will not be removed from his present custody. I think that it is only fair that the U. S. Attorney give the Court that assurance.

The Court: I wouldn't care to limit the Government, or the Respondent who holds the prisoner, from his discharge at any earlier time.

Mr. Anthony: I didn't mean that, your Honor. I didn't want him removed out to some other confinement where the sheriff can't obey the orders of this Court. That, in my judgment, would be clearly in contempt of this Court.

The Court: I should so regard it.

Mr. Anthony: And the U. S. Attorney should realize that.

The Court: The motion for a ten days' extension is granted the Petitioner. I should like to have the District Attorney inform the Attorney General that the Court is of the opinion, strongly, that in the meantime the Petitioner should be given an opportunity to have his freedom pending the determination of the order to show cause, upon the Petitioner furnishing a substantial bond fixed by the Court. I consider that ten days is sufficient time, barring unforeseen incidents or accidents, for the Department of Justice and Department of War to get attorneys here from Washington, if they make [244] a speedy effort to do so. And this is a case, as is any habeas corpus case, that calls for

and demands speedy and prompt action and attention.

Is there anything else before the Court at this time?

Mr. Crozier: I have prepared a written order, if the Court please, and have submitted it to Mr. Anthony, and I take it, Mr. Anthony, it meets with your approval as to form.

Mr. Anthony: Yes, satisfactory.

Mr. Crozier: May I ask the Clerk to hand it to your Honor? And that will be filed?

(The Court receives document referred to above and affixes signature.)

The Court: Yes.

(The hearing adjourned at 9:35 o'clock, a.m.) [245]

I, Albert Grain, Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify as follows:

That the foregoing is a true and correct transcript of stenographic notes taken by me in the Matter of Application of Lloyd C. Duncan for a Writ of Habeas Corpus, Habeas Corpus No. 298, held in the U. S. District Court, Honolulu, T. H., on March 20, 1944, Hon. Delbert E. Metzger, Judge, Presiding.

(Signed) ALBERT GRAIN

Mar. 21, 1944. [246]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the United States District Court, Honolulu, Territory of Hawaii, on March 31, 1944, at 10:08 o'clock, a.m.,

Before

Hon. Delbert E. Metzger, Judge.

Appearances

G. D. Crozier, Esq.,
U. S. District Attorney, appearing for the Respondent;

Edward Towse, Esq.,
Assistant U. S. District Attorney, appearing for the Respondent;

Edward J. Ennis, Esq.,
Special assistant to the U. S. Attorney General;

Lt. Col. William J. Hughes, Jr., U.S.A.,
Judge Advocate General's Department;

Lt. Col. Eugene V. Slattery, U.S.A.,
Judge Advocate General's Department;

[248]

J. Garner Anthony, Esq.,
of the law firm of Robertson, Castle and Anthony, appearing for the Petitioner.

Federal Court Building
Honolulu, T. H. [249]

PROCEEDINGS

The Clerk: Habeas Corpus No. 298, in the matter of the application of Lloyd C. Duncan for a writ of habeas corpus, called for hearing on return to order to show cause.

Mr. Crozier: If the Court please, may I state for the record, and for your Honor's information, that the Attorney General of the United States has designated Mr. Edward J. Ennis as special assistant to the Attorney General to assist the U. S. District Attorney for the District of Hawaii in representation of the Respondent in this proceeding?

The Court: Very well.

Mr. Ennis: With the Court's permission, I would like to state preliminarily that, as the Court knows from our discussion in the chambers, it is the Government's position where the privilege of the writ is suspended, it should not issue and the Petitioner should not be bailed; but, in view of Mr. Anthony's suggestion that, in fairness, the Petitioner ought to be in Court when his case is presented. The Government has requested the Sheriff to be present and to have the Petitioner present. The Petitioner has been asked if he would like to be present, and he said Yes. And we will produce him in Court and have him present with the Sheriff, without, however, waiving our legal contentions that the writ should not issue and the Petitioner should not be bailed.

Mr. Anthony: If the Court please, the day before [250] yesterday, I was handed a rather voluminous document which contains a great many allega-

tions, as I conceive, most of which are utterly irrelevant to any issue in this cause. And I have thus far not completed a traverse. I would like at this time to enter an oral traverse and advise the Clerk that I am prepared to file a traverse in writing, which will deny all the material allegations set forth in this order to show cause.

The Court: You may make your traverse orally. Do you wish to do so?

Mr. Anthony: Yes, I wish to do so.

The Court: Very well.

Mr. Anthony: The Petitioner in this cause denies all of the material allegations which are set forth in the return and the answer to the order to show cause, and the Petitioner reiterates his contention that the writ of habeas corpus should issue, that the writ should issue forthwith. The cause can then be heard upon this return, which could be adopted by the Government as a return to the writ itself, and then the Court could proceed to an orderly determination. I would like to address myself at this time, if I may, to the proposition of whether or not the writ should issue at this moment, without passing upon the facts set up in the order to show cause and the return to the order to show cause, if I may do so.

The Court: Well, that is the matter that is before [251] the Court at this session: should the writ issue?

Mr. Ennis: If the Court please, I would like to make an argument, a legal argument, against the issuance of the writ, to be heard by your Honor

either now or after Mr. Anthony, as your Honor directs.

The Court: You may be heard now.

Mr. Ennis: The Government has two legal points that it would like to make on the question of whether the writ should issue at this time. The first is based upon the legal proposition that where, upon the petition and the return to the order to show cause and to the petition, it appears to the Court that there is no issue requiring testimony or further proceedings, the Court can at this time dismiss the petition and deny a writ.

As I see it, your Honor, the purpose of the order to show cause procedure, which has the sanction both of the rule of this Court and of the Supreme Court, is to give the Government an opportunity by a return to indicate to your Honor the legal or factual reasons why a writ should not issue and why the petition should be discharged.

As I read the petition and the return, the Petitioner seeks to raise two questions, one, a legal question, which we might call the statutory question as distinguished from Constitutional questions—the statutory question being, whether the Executive Branch of the Government has complied with the mandate of Congress which requires that the privilege [252] of the writ shall be suspended and martial law shall be declared when the conditions of public safety require it and imminent danger of invasion is present. As I take it, the Petitioner's first contention is that those conditions are not present.

His second contention, which I call the Constitutional contention, is, whether or not we have complied with the requirements of Congress and whether or not the privilege of the writ is Constitutionally suspended under the statute, and whether or not martial law is present under the statute, that there is no military necessity and therefore unreasonable and un-Constitutional for the Government, the military authorities, to try Petitioner before a military tribunal for the offense of assault and battery on a military sentry with the intent to impede him in his official duties.

Now, the only issue of fact which could be raised by the petition and return, as I read it, is whether or not there is any imminent danger of invasion, and whether or not public safety requires suspension of the privilege of the writ, and martial law being in effect. That would be one question.

The second question is, whether or not there is any military necessity requiring the trial of such a case as the Petitioner's before the Provost Court.

Now; on those issues of fact the Government has submitted the affidavits of the highest military authorities in the [253] Territory, Admiral Nimitz and General Richardson. And in their affidavits they recite, both, that there is imminent danger of invasion and the public safety requires the suspension of the privilege of the writ, and martial rule; and, also, that military necessity requires the trial of such cases as here involved before a Provost Court.

Now, it is my contention very simply that, where the only source of evidence upon those facts, the only reliable source, is the military authorities, and where the highest military authorities in the Territory have stated the view of the military authorities on the question, there is no triable issue of fact; and the Court can properly, on the petition and the return, dismiss the petition and deny the writ. The procedure the Court would be using, if it did that, would be very analagous to the summary judgment procedure where the Court, on affidavits, determines that there is no reasonable issue of fact, no substantial issue of fact, and under modern practice is empowered to dispose of the case without a trial, including testimony.

I will not elaborate on that first point of the Government's position because it is, I think, pretty clear what we mean. And I will now address myself to the second proposition, and that is, that if the Court perceives in its examination of the pleadings that there is a triable issue of fact, we address ourselves then to the technical and procedural question of whether we should get at that issue [254] of fact by merely fixing a trial date on the pleadings as we now have them—the petition and return to the petition and order to show cause—or whether before doing so the Court should issue the writ of habeas corpus.

Now, on that question, that procedural question, my observations are these, that if the privilege of the writ had not been suspended, so far as the Executive Branch in the exercise of its Constitu-

tional powers can do so, it would seem to me, under the controlling rule of Walker versus Johnston, that where the Court perceives an issue of fact the proper practice is to issue the writ; and upon a return to the writ, whether it be a new return or whether the return to the order to show cause be adopted as the return to the writ, to try the issues by testimony. Now, it is my view that, whether or not we have sought to suspend the privilege of the writ, the better practice would be to try the issues at this stage of the case, on the present return and petition, and to postpone the issuance of the process of the Court, the writ, until the Court had decided that either we have not complied with the statute or we have not complied with the Constitution, and therefore the privilege of the writ is not suspended.

My reasons for proposing that procedure to the Court are these: In determining the proper judicial procedure, it is not sufficient for us to refer to one statute of Congress, namely, revised statute, Section 755, which controls [255] the procedure in habeas corpus in the ordinary situation where there has been no effort to suspend the privilege of the writ; as I stated, in the Walker versus Johnston case, if your Honor would perceive an issue of fact, you would issue a writ. But we must look for a proper rule of judicial procedure. By reading that statute, the general statute, with the specific statute which is involved in this situation, namely, Section 67 of the Organic Act, which provides for the suspension of the privilege of the writ, the Court, I submit, should devise its procedure to take into

account the different purposes of Congress in the general statute and the specific enactment here.

Now, in urging that the Court try any issue of fact without issuing the writ, I would like to call the Court's attention, as an analogy, to the Congressional provision where there is a suspension of the privilege of the writ—and, as far as I know, in the history of the United States Congress has provided the procedure where the privilege of the writ was suspended in only one instance, namely, in the Act of 1863, controlling habeas corpus procedure in the courts, where the President, as the statute said, during the course of the rebellion has suspended the privilege. And in such a case Congress said that the writ might issue, but that any person held by the military authorities, that there should not be a body return to the writ but merely a written, sworn return stating the cause of detention. [256]

Now, in speaking of that statute the Supreme Court of the United States, in ex parte Milligan, stated that the suspension of the privilege of the writ does not suspend the writ itself, but that the return to the writ should be the written return giving the cause for detention and not a return of the body.

Now, these analogies take us to this position, that I think we should recognize that where the privilege has been suspended, the Court giving some recognition to the Executive Department's suspension of the privilege, pursuant to Act of Congress, will modify its normal writ procedure to some extent.

Now, the precise question, the procedural question, as I see it, is whether the Court should issue

the writ and modify its terms to require a return, a return return, but not require production of the body until the Court decides the case; or whether, exercising the tradition of judicial restraint which the Federal Courts always exercise in approaching either an act of the coordinate branch of the Government, the Executive Branch, or a Constitutional question, the Court should even go a step further and not issue the writ at all but merely state that upon the return being filed the issues will be tried, and the issuance of the writ will be postponed until the Court, upon the trial of all of the issues, makes a determination on the statutory and the Constitutional question. [257]

Now I propose this last course, namely, that the writ shall not issue but that we try any issue the Court perceives, although, as we say, we perceive no substantial or triable issue. I propose that course as the one that certainly will not prejudice the Petitioner. I think it will indicate to the public and to everyone at large that the Court, in exercising its judicial function and the most important function of determining such issues, is devising a procedure and is exercising a procedure which, pending determination, interferes as much as necessary to protect the Petitioner, and permits the ordinary operation of the Executive Department.

And, therefore, for the reasons I have stated—and I'd be glad to submit a memorandum to your Honor on it—I suggest, first, that the writ not issue, but that if the Court determines, on the basis of the precedent, that it is proper to issue a writ, despite

the suspension of the privilege, then that it be merely the writ, the written return, and not direct production of the Petitioner in Court at this time.

Now, a wholly separate question to which I wish to address myself, apart from the procedural question, is the question of whether the Petitioner should be placed on bond at this time. And I don't know whether your Honor would prefer me to proceed to that separate question or whether you prefer to hear Mr. Anthony on the issuance of the writ.

The Court: Yes, I would rather hear the particular matter that is before the Court now. [258]

Mr. Anthony: If the Court please, the two points that the Attorney General has stated to your Honor, one, that there is no triable issue of fact, and, two, the procedural means of how this case should be tried, are quite evidently wholly inconsistent. If it is the law of this Court that, upon the simple filing of an affidavit by an Admiral and a General, this Court may look no further into the facts which the Court has full knowledge of, and which probably everyone in this courtroom has full knowledge of, namely, the absence of imminent danger of invasion, then there is no need to discuss the procedural question whatsoever. I gather that Counsel is not relying too heavily upon that, since he has filed a very elaborate return setting up a great many facts,—rather, having the Sheriff setting them up—on information and belief, which facts presumably must be proved by some witness. They are not proved by either the Admiral or the General. I gather from that situation that he does

not rely really, truthfully, upon the contention which is their preliminary contention, namely, that there is no issue of fact, that all this Court may do is to dismiss this petition and remand the prisoner to his jailer.

I will turn to the next proposition which Counsel devoted most of his time to. This case, if your Honor please, does not involve any question of military security. This is a very simple offense. If this Petitioner has committed an offense, it is a very simple one, namely, he has assaulted, [259] so it is said, two marines on a Naval reservation. This Court, for more than a year, has exercised a full criminal jurisdiction—this Court exercises full criminal jurisdiction over assault and battery which is committed on Naval reservations. If it is the fact that this man has done anything which would warrant his trial and conviction, the Courts are open, this Court is open; he could be brought into this Court upon an information under the judicial code for a commission of the alleged crime of assault and battery on a Naval reservation.

Now, I say that is not an issue which in any way relates to the security of these islands. He is not charged with being a subversive character. Your Honor can look at him and see that he is not a Japanese, although Petitioner has made verbose allegations as to Japanese. All we are saying here is that this individual, a citizen of the United States who is charged with nothing which even remotely resembles a cause which is properly triable before a military tribunal, should be given a trial in accord-

ance with the Constitution and the laws of the United States.

Now, that being so, what is the procedural objection, as Mr. Ennis styles it, to the issuance of the writ and the trial of the case in the normal and orderly course as contemplated by the judicial code? He can't get away from the Territory if he wanted to. Your Honor knows and can take judicial notice of the fact that transportation is entirely [260] within the control of military and naval authorities. More than that, this Court has ample power, should it later determine to issue the writ, to enlarge him upon bond made returnable to this Court. What, then, is the basis for the Government's contention? How can the United States of America be injured by the issuance of this writ? Mr. Ennis says that this is a procedural matter. I say to Mr. Ennis, and I say to this Court, if Mr. Ennis were down in the county jail he would think it more than a procedural matter.

I say, if the Court please, that this is an invasion of the civil liberties of this Petitioner. He has been denied, according to the allegations of the petition, the kind of a trial which the Constitution says he may have. And when we come before this Court in order to ascertain whether that is correct, we are met by a statement on the part of the Government that for reasons of procedural convenience Counsel requests and asks this Court not to issue the writ.

I say, if the Court please, that this case has not thus far been conducted in the manner which the

judicial code contemplates habeas corpus proceedings should be conducted, namely, in an expeditious and speedy manner. And this matter grew out of deference to Mr. Ennis and the Attorney General of the United States at the hearing on the motion for a continuance, which I joined. However, we have now reached the stage where there are sharp issues of fact to be determined [261] by this Court.

Why should the Petitioner be obliged to not have the writ issue and not be able to be in a position to ask this Court that he be enlarged on bail pending a lengthy trial on the facts of the issues raised by this very elaborate return? More than that, undoubtedly at the conclusion of the trial the U. S. Attorney and the Attorney General and the Army would probably ask time for the filing of briefs. That time will go on. Possibly they will come in and ask for an extension. In the meantime, the Petitioner is still down in the jail.

Now I say that this Court, without passing upon the merits of the facts set forth in the return, should not adopt a procedure which shall deprive this Petitioner a means of applying to this Court for his enlargement on bail. And that is precisely what will be done if the suggestion of the Attorney General is followed in this case.

Mr. Ennis: The only comment in reply that I would like to make, your Honor, is that I understand that, although the civil law may provide for the trial of the offense of simple assault committed on a military reservation, there is no civil provision for the offense with which the Petitioner was

charged, of an assault upon a military sentry with intent to interfere with the performance of his duties, which is expressly provided as a military offense.

Now, as I take it, we have not yet come to the equitable [262] balance of convenience on the question of bail, and so far I have addressed myself merely to the question of whether the Court should issue the writ. And I will just conclude by saying that at the very minute if the Court decides to issue the writ, I hope that the Court will follow what I consider the controlling precedent of the Milligan case, which says that where the privilege of the writ has been suspended, pursuant to the Act of Congress, the writ when issued shall require a written return but shall not require the production of the body of the Petitioner in Court.

Now, if the Court issues the writ in that fashion, or decides to issue the writ in that fashion, the Government is prepared right now to argue out the question of whether in your Honor's judicial discretion the Petitioner should be released on bond pending the trial of any issues that your Honor perceives in the case. I will address myself to that question, or wait until your Honor's ruling, if you wish.

The Court: I have read the return made by the Respondent to the order to show cause, whether the writ should issue, and I have examined all of the exhibits, all in all more than 175 pages. I have read with particular interest the affidavits made by General Richardson and Admiral Nimitz. The

question properly presented before the Court at this time is, should a Writ of Habeas Corpus be issued in this case upon the showing made in the petition and in the return to the order to show cause? [263]

The question as to martial law was raised in the petition and went into a considerable length in the return. Both parties seem anxious to make that an issue and bring it to a trial. They have made it an issue. It is quite conceivable, to my mind, that martial law could exist in a place without the suspension of the writ of habeas corpus. Now, this Court has already held that the earlier proclamation as to the suspension of the writ—the proclamation of Governor Poindexter on December 7, 1941—was annulled and the privilege of the writ was restored by the Governor's proclamation of February 8th, effective March 10th, 1943.

By the order to show cause, issued out of Judge McLaughlin's division of the Court, it implied invitation to present material to convince the Court of the error of that finding. But I have seen nothing in the return which convinces me that the Court was in error there. I believe that, upon the allegations of the petition and the statements made in the return to the order to show cause, there is before the Court a sufficiently substantial showing to justify and demand that a writ issue in this case.

Accordingly, it is the order of the Court that a writ do issue returnable tomorrow morning at nine o'clock, if that is an agreeable time to Counsel.

Mr. Ennis: If the Court please, I assume that

the writ will be in the usual form and require the production of the body? [264]

The Court: Yes.

Mr. Ennis: May I have an exception to the ruling?

The Court: Yes.

Mr. Ennis: I don't wish to disturb your Honor's procedure. Of course, we would be delighted to go on tomorrow morning, if your Honor wishes to and the opposing Counsel agrees. I would be entirely content to state on the record that we could deem that the Petitioner is now produced, that the writ issue forthwith, and that the Petitioner is deemed produced pursuant to the writ, and proceed at once to the bail question.

The Court: That is satisfactory to the Court, then. Mr. Clerk, let the writ issue, returnable forthwith.

Mr. Ennis: I have no objection to the form of the writ, your Honor.

(A typewritten document is handed to the Court.)

The Court: You have prepared this, Mr. Anthony?

Mr. Anthony: Yes, your Honor.

The Court: Anticipatory?

Mr. Anthony: I had it before Judge McLaughlin, your Honor, and I was disappointed. As a matter of fact, it does have Judge McLaughlin's name on it. The Attorney General calls my attention to that fact. I will have it retyped.

The Court: Instead of "forthwith" I made it returnable at ten o'clock forty minutes, in order to not change the general form of it. [265]

(The Court affixes signature on the document.)

Mr. Ennis: If the Court please, and in the interest of further expedition of the matter, which is also the Government's interest, I request that the return filed by the Govrnment to the order to show cause be allowed, with the Court's permission, to stand as the return to the writ, with Counsel's permission.

The Court: That is allowed. The return filed is, to my mind, quite an appropriate one as a return to the writ. Let the record show that at this hour, 10:40 a.m., the Sheriff of the City and County of Honolulu, Duke P. Kahanamoku, appeared and was present in the Court with the Petitioner, his prisoner, Lloyd C. Duncan.

Mr. Anthony: May I speak to Counsel for just a minute?

The Court: Yes. Do you want a recess at this time?

Mr. Anthony: We might have a short recess.

The Court: Very well.

(A short recess was taken at 10:40 o'clock, a.m.)

CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

(Pages 487 to 977)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 14

LLOYD C. DUNCAN, PETITIONER,

vs.

DUKE PAOA KAHANAMOKU, SHERIFF OF THE CITY AND COUNTY OF HONOLULU

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1944.

CERTIORARI GRANTED FEBRUARY 12, 1945.

No. 10763

United States

Circuit Court of Appeals

For the Ninth Circuit.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,

Appellant,

vs.

LLOYD C. DUNCAN,

Appellee.

Transcript of Record

In Three Volumes

VOLUME II

Pages 487 to 977

Upon Appeal from the District Court of the United States for the Territory of Hawaii

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Rotary Colorprint, 590 Folsom St., San Francisco

After Recess

The Clerk: The return to the writ is as follows:

"The within Writ was received by me on the 31st day of March, A.D. 1944 and is returned executed this 31st day of March, A.D. 1944 upon Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, Territory of Hawaii, by exhibiting to him the original Writ and by handing to and leaving with him a certified copy of the same.

Dated at Honolulu, T.H. this 31st day of March, A.D. 1944.

(s) OTTO F. HEINE,
U. S. Marshal, District of
Hawaii." [266]

The Court: All right, Mr. Marshal, the Petitioner is now in your custody.

Mr. Ennis: If the Court please, may I state for the record that the Respondent, in producing the Petitioner pursuant to the writ of the Court, does not waive his objection to the issuance of the writ but maintains his position that, as a matter of law, the writ should not issue where the privilege has been suspended?

The Court: Yes.

Mr. Anthony: If the Court please, I would like now to address myself to the question of whether or not the Petitioner should be enlarged on bail. As this Court knows, persons who have been taken in the custody of military authorities in this Territory have been taken in custody for a variety of reasons, some of which may have been good, some

of which may have been bad. In some instances there have been persons taken into custody because of subversive activities or because of the commission of offenses against the laws of war.

This Court knows, from the disclosure that has been made in the petition and the return, that at the very most the acts of which the Petitioner has been charged, tried and sentenced, under no circumstances could be more than a misdemeanor. In other words, in any known system of law, it is a simple case of assault and battery. The Government has made some effort to enlarge the degree of the offense because, they say, it has violated an order of the Military Governor. [267] That issue we will get to when the cause is tried on the merits. Our position, of course, is that the so-called Military Governor is without authority to decree laws of this nature, and, in fact, the office is non-existent under the Constitution and laws of the United States.

Your Honor, then, has before him a person who, on the face of the petition, has been illegally tried and convicted upon an alleged set of facts which at most would only constitute a simple assault—the character of case that is tried every day in this Court, involving persons down at the Naval reservation, tried every day in the Police Court of Honolulu, involving the common, ordinary affrays and assaults which you may expect in any community. And I might say if such a case were tried in this Court, or any other court of this Territory, incredible as it may seem if the Court would on the facts of this case find the Petitioner guilty, I would

be very much surprised if any Judge of this Court or any Judge of the Police Court would have given the defendant in such a case any more than a ten dollar fine, or something of that nature. In other words, what I am getting at is this, that this offense, the very gist of it and the very essence of it, is trivial. Nobody can tell this Court that the mere fact that there may have been a slight brawl down there at the gate at Pearl Harbor Navy Yard was any threat to the power and strength and dignity of the United States.

Under those circumstances, I say that while this case [268] is being tried, there is no reason why this man should not be enlarged upon bail. Your Honor has had before him on a number of occasions exclusion cases. Those cases, if the Court please, have a certain degree of seriousness to the United States, for if a Chinese immigrant is released on bail, loses his identity among other Chinese in the community, the U. S. Marshal may have some difficulty in finding him. I can understand how the Court might be reluctant in such a case to admit a man on bail. Also, I can understand how in a case in which a man had committed a felony this Court might be reluctant to admit a man on bail, particularly when the felony is a serious one and should be properly tried in the courts of the Territory. I can understand how this Court, in a case involving any issue of military security, would be reluctant to admit a man on bail.

These instances that I have referred to, however, are not the case of the Petitioner who sits in this

courtroom. This man has been charged with committing acts which at most constitute a very simple offense.

Now, under these circumstances I submit that there is no prejudice to the Government, none whatsoever; the man cannot, as a phyisal matter, escape from the Territory; he cannot, as a matter of law, harm the Government, for, in the event a ruling of the Court should be that he would be remanded to the military authorities to serve out the balance of his sentence, or rather remanded to the Sheriff [269] to serve out the balance of his sentence, pursuant to the military orders, then what harm has been done? The militarists' ideas of justice in such instance would have been satisfied.

On the other hand, I think we have made a fairly clear case, that the Petitioner has something to talk about. He has got the kind of a case which, under the Constitution and laws of the United States, at most requires an information or an indictment, and certainly demands a trial by jury.

Now, if he is not admitted to bail until the determination of this case, that will mean he will be irreparably injured. Now, I say that is a sufficient reason why now that the writ has issued, now that the body of the Petitioner is in the custody of the Marshal awaiting instructions of this Court, that that is ample reason for permitting this man to be enlarged upon bail pending determination of his cause. Counsel will undoubtedly say that if your Honor enlarges the Petitioner on bail, that he has other cases in which he might represent the United States of similar nature, of illegal

trials and convictions or alleged trials and convictions, that they might be brought to the attention of this Court. My answer to that, if the Court please, is this, that we are dealing with the case of this man who is before the Court; we are not dealing with any vague number of individuals who may be now in prison under military orders. Those cases, if any such cases there are, will be dealt with if and when they are ever presented in Court. [270]

I say that the balance of convenience is not a sufficient argument when you are dealing in terms of the liberty of an individual, and, therefore, I respectfully urge upon your Honor that this man be enlarged upon bail and that the bail be fixed in the sum of $500.

Mr. Ennis: May it please the Court, in answer to the application for release on bond, I have three points to make: one, on the facts appealing to your Honor's discretion; two, on the law; and, three, an alternative to releasing the Petitioner on bond.

Now, on the facts. If Mr. Anthony had stated to your Honor that this case involved either a felony or military security, he would understand the reluctance to release the Petitioner on bond prior to the decision that he was unlawfully held. I assume that your Honor has read the proceedings of the Provost Court which have been annexed as one exhibit to the return. I cannot share Counsel's feelings that the offense of assaulting a military sentry at the main gate of Pearl Harbor, between 10:30 and 11:00 o'clock in the evening—when I understand there is a great deal of traffic at that

place when the night shift is going on—with the intent to interfere with the official duties, is a trivial offense or is a misdemeanor. Mr. Anthony says that under any known system of law it would be a misdemeanor. Now, the only system of law which deals with such offense is the military law. And I believe that for one in the Armed Services who [271] assaults a sentry, that is punishable by five years in peacetime and even by death in time of war, which indicates that the offense is not considered as a trivial one or as a misdemeanor. Also, the order under which the Petitioner was tried provides for a penalty, I believe, up to five years in prison.

Now, under our Federal system any sentence of a year or over is considered as a felony; and I think that for purposes of the exercise of your Honor's discretion, in reading the records of the Provost Court which have been annexed for your Honor's information, this case should be looked upon as a felony, and the rule that Counsel suggested, namely, judicial reluctance to release a person convicted of a felony, should be applied.

Now, on the facts. As I said, if your Honor will read that record, I believe that there are no appealing equities in the Petitioner's favor. And I believe there are equities in favor of the attitude of the Government in this situation. And your Honor will, of course, balance the conveniences.

Now, on the side of the Government is the consideration—and a very practical one—that although the Petitioner's own case does not involve one type

of security mentioned by Counsel, namely, a person held by the military authorities as a danger to security, it does involve security in a different and larger sense: the entire Provost Court system clearly, insofar as it regulates violations of such orders [272] as those which prohibit attack on military sentries in an active theatre of war, does involve military security. And I think, unescapably, before your Honor determines and decides to release such a person as the Petitioner in such case, pendente lite, that it will invite other applications for writs solely for the purpose of obtaining similar release pending determination.

Now, that is a valid consideration, and it is also a valid consideration that this is in its nature a kind of a test case, and I submit, your Honor, that the administration of order in the community, as well as the administration of justice in a test case indicates that the individual should not be released by what amounts to a predetermination of the issue before the Court.

Counsel has adverted several times to the civil liberties of the Petitioner. I agree that the civil liberties of the Petitioner are the question in issue, but that is the question for your Honor to decide, and not to pre-judge as Counsel would have the Court do by releasing the Petitioner prior to determination. Those are the considerations on the facts addressed to your Honor's discretion.

Now I would like to address your Honor on one consideration of law. I believe that the purpose of the suspension of the privilege of the writ of

habeas corpus is to prevent the release of persons held by the military authorities for military offenses. And I submit, your Honor, that, as a matter [273] of law, where the Executive Branch of the Government, with the approval of the President, has undertaken to suspend the privilege of the writ, the privilege should not be granted prior to a Court's determination that that attempted suspension is unlawful. In other words, we can't deal with this case as an ordinary case of appealing to your Honor's discretion, because it has the legal element of suspension of the privilege of the writ pursuant to an Act of Congress.

Now, where the return shows, as it does, that the highest military authorities assert to your Honor that the privilege has been suspended, that martial law prevails, and that such cases as the Petitioner's should be dealt with in military courts, as a matter of military necessity, and in conformity to the conditions laid down by Congress, that with all that before your Honor, as a matter of law, the very privilege which has been suspended should not be granted as interlocutory relief.

The third consideration which I want to bring to your Honor's attention, in addition to the balance of facts and the legal proposition, is the substitute for the release of the Petitioner on bond, and that is, that the Government urges upon your Honor that if the Petitioner should not be released prior to your Honor's determination of the very issue of whether he is lawfully held, then the Government should, and we now do, come forward and

say that we want to do everything we can to get your Honor to the position where you can [274] decide that question. In other words, we offer as a substitute for the Petitioner's release at this time that the case be tried at once, and that your Honor reach a decision on the question before your Honor, so that then, at a more proper time, the Court may take up the question of whether the Petitioner should be released from his present custody. Now, we think that, as a matter of normal, practical operations of Government, that the better practice in this situation is to give the Petitioner his trial right away.

We would like to try any issues on Monday. I don't share Counsel's view that this case is going to take a week to try. I certainly know the Government's case isn't going to take more than a da to try. And, of course, I am not aware of what the Petitioner's case is. But I believe we can dispose of the trial of this case in a couple of days. And for all of those considerations the Government urges that the request for release pending the litigation be denied, in view of the fact that the privilege of the writ has been suspended so far as the Executive Department of the Government is concerned, including the President of the United States, pursuant to an Act of Congress.

The Court: Well, the Petitioner is now in the custody of the Marshal. The Marshal has no great facilities for housing anyone as a prisoner. He has a cell in the building here, but it is inadequate for the purpose. I don't want to put the Marshal to

any undue inconvenience. The Marshal [275] would have no right to put the man in jail; he has no means of putting him in jail and issuing any mittimus or any other order that would be safe for any jailer to accept under the circumstances. The thing that the Court is concerned with is whether the Petitioner will respond to and obey any orders of the Court pending the final determination in his hearing. And in view of the location here, the improbability of escape, the impracticability of escape, I believe that a bond of $500 is adequate for that protection.

Mr. Ennis: Well, I'd like to make—excuse me, your Honor.

The Court: Go right ahead, go ahead.

Mr. Ennis: I'd like to make two suggestions, your Honor: one, the Court's reference to the Petitioner being in the Court's custody under the law, that is true, and the Court may place, as the statute provides, the Petitioner in the custody it deems best. It has been my experience in other Federal District Courts, particularly in New York, where I have seen many hundreds of habeas corpus cases, that it is most extraordinary indeed for the Court to change the custody of the Petitioner from that of the Respondent to the U. S. Marshal. I know of no case where that is done unless there is some showing that there is some abusive custody by the Respondent.

The Respondent in this case is an official of the City and County. The Petitioner has not com-

plained that he has [276] been subjected to any mistreatment, and I think that so far as custody is concerned, the ordinary rules should follow and the Petitioner should be left in the Respondent's custody.

Now, turning to the second question, if your Honor feels that apart from the question of facilities—and I think the facilities of the Respondent are adequate—that nevertheless the bail is proper, with your Honor's indulgence I would like to speak to opposing Counsel just a moment on the amount of bail.

The Court: Yes.

Mr. Ennis: If the Court please, of your Honor decides, has decided to fix bail, why first I would like to take exception to bail being allowed in such a case; and, secondly, I would like to suggest that the bail be fixed at $1,000.

The Court: I am of the opinion that the bail of $500 is adequate. Anything more would serve no useful purpose in the nature of bail and would impose a hardship. Five Hundred Dollars is satisfactory, and my mind is satisfied that the Petitioner should have the right of bail. Of course, when I said he was in the custody of the Marshal, I well know that he is in the custody of the Court, but that's the only officer to which the Court can look in a matter of this kind, so that the Court naturally transfers his physical custody to the Marshal.

Mr. Ennis: Well, your Honor, the last point I'd like [277] to make is, of course, one considera-

tion in suggesting the bail, that we do have substantial concern that there might be loose upon the Court a number of petitions of habeas corpus solely to obtain release pending adjudication. That is one consideration. It is just a thousand dollar bail. And I hope in fixing it in this case you will not consider that as a precedent for other cases.

The Court: That is a possibility. But I can't anticipate anything of the kind, and the Court will deal with every case on its own facts and circumstances and merits.

Now, the matter of the release of the Petitioner upon his furnishing a satisfactory bond or bail money in the sum of $500 being settled, when do you want to proceed for a hearing on the writ? The return is in.

Mr. Anthony: The return is on file, your Honor. As you know, it is a rather elaborate document.

The Court: Do you want to file a——

Mr. Anthony (Interposing): I want to file a complete traverse which will take me a little time, and also I'd like to examine a number of facts which I think will be relevant. I would say next Wednesday, if that is convenient for the Court, at nine o'clock. Maybe we can get through with the case in several days. The reason I ask for Wednesday rather than Monday, your Honor, is that I am genuinely of the opinion that if I could have the next several days ironing out the evidence and formal matters, many of which I can agree with [278] Counsel, we can shorten up the actual action of the case.

Mr. Ennis: Well, of course, the Government would like to try it as soon as possible, and we'd be prepared to go on Monday, if your Honor would decide.

Mr. Anthony: Would you have any objection to going on Wednesday?

Mr. Ennis: We have no objection to Wednesday, if that is satisfactory to the Court, and if Counsel can't be prepared sooner than that, but we are very anxious to get the case tried.

The Court: The Court is desirous to move in the matter with expedition. The statute provides that a habeas corpus hearing should be rather summary. It clearly indicates that it should not be a drawn-out affair but should be heard as quickly as can be upon the merits. And I am ready and desirous to go forward and dispose of this case as soon as it can be. I think that Wednesday would be the earliest reasonable time.

Mr. Anthony: If your Honor tells me that I must go to trial Monday, I should do so.

The Court: I don't tell you that, but I am asking you about it. Do you think that if we continued it until Wednesday that it would really aid in an early trial and disposition?

Mr. Anthony: I'm quite satisfied of that, your Honor; instead of the usual delays that might occur, I think we might [279] be able to finish the case up by the end of the week, if I'd be granted that time, to Wednesday. And I might ask, if your Honor would be willing I'd be perfectly willing to go through morning and afternoon sessions. I

know that usually this Court adjourns at 12:30, but if in the interest of summary disposition, as contemplated by the judicial code, your Honor would like to do that, that is perfectly agreeable to me.

The Court: Well, I do occasionally. But with other affairs that take up the recess and lunch hour —and yesterday I was on the bench all day until 4:15 from 8:00 o'clock in the morning on—and it is a rather strenuous day's work, with administrative affairs to look after and correspondence after working hours on the bench, so that I feel and have found from experience with the lawyers as well the Court, that we make just about as much headway with a lengthy half-day session as we do with an all-day session. However, whatever the Counsel agree to in that respect with regard to this case, the Court would be willing to meet.

Mr. Anthony: The Attorney General says that it is agreeable to him to start Wednesday and follow the Court's regular practice as to the hours in attendance.

The Court: Very well, the case is continued, then, until Wednesday next, which is April 5th, at nine o'clock, a. m. Is there anything else before the Court at the present time?

The Clerk: No, your Honor.

Mr. Ennis: If the Court please, so that the Respondent [280] may be instructed, in whose custody will the Petitioner be until the bond is provided?

The Court: In the Sheriff's.

Mr. Anthony: In the Marshal's.

The Court: I mean in the Marshal's. Pardon

me, that was just a slip of the tongue. If the bond or bail isn't forthcoming and the Marshal finds his ward too much of a burden, why we may make him some other provision.

(The hearing adjourned at 11:30 o'clock, a. m.) [281]

I, Albert Grain, Court Reporter, U. S. District Court, Honolulu, Territory of Hawaii, do hereby certify the following:

That I am the official Court Reporter of the above-named U. S. District Court;

That the foregoing is a true and correct transcript of proceedings transcribed by me from notes taken by machine shorthand in Habeas Corpus No. 298, In the matter of the Application of Lloyd C. Duncan for a Writ of Habeas Corpus, held in the above-named Court before the Hon. Delbert E. Metzger, Judge, on March 31, 1944.

Apr. 3, 1944.

ALBERT GRAIN. [282]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the United States District Court, Honolulu, Territory of Hawaii, on April 5, 1944, at 9:08 o'clock, a. m. [283]

PROCEEDINGS

The Clerk: Habeas Corpus Docket No. 298, In the matter of the application of Lloyd C. Duncan for a Writ of Habeas Corpus, case called for hearing.

Mr. Anthony: If your Honor please, I presume that the Court has examined the petition, the return and the traverse. Before beginning the hearing, a brief statement might be appropriate in regard to the traverse.

As we read the return, the Respondent seeks to present issues far broader than the issues which are necessary to the adjudication of this case. The Respondent in his return has set up elaborate allegations with reference to the Military Governor's Office, as it is called, of the Territory of Hawaii. This case can be disposed of without that on the petition, but by reason of the fact that these allegations were introduced by the Government in this case, we were obliged to set up in our traverse a denial of the lawful existence of that office.

There are other allegations which, so far as the Petitioner is concerned, are irrelevant to any issue in this case; but again, by reason of the elaborate return and answer to the order to show cause, we have felt obliged to deal with those, and we feel obliged to deal with those issues in the way of evidence. We are ready to proceed with the proof, your Honor, unless Counsel wishes to make a statement at this time. [287]

Mr. Ennis: Well, I will just state very briefly,

your Honor, that the issues are made by the law applicable to the case and not by what either side may have alleged, which is not necessary to the adjudication of the case.

Mr. Anthony: Mr. Duncan, will you take the stand, please?

LLOYD C. DUNCAN,

the Petitioner, appearing in his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your full name, please?

A. Lloyd Clifford Duncan.

Q. Where were you born?

A. Sheridan, Wyoming.

Q. How old are you, Mr. Duncan?

A. Twenty-five years old.

Q. Where did you go to school—briefly?

A. In Sheridan.

Q. Public schools of Sheridan? A. Yes.

Q. After you left school, where did you seek employment?

A. I worked for my uncle in California, Joe Ross, in a garage for a time, and then I received a job at the Mare [288] Island Navy Yard.

Q. What year was that? A. In 1939.

Q. How long did you work at Mare Island?

A. Well, I worked there approximately two years before coming here.

(Testimony of Lloyd C. Duncan.)

Q. Did you learn any trade while you were there?

A. Yes, a trade of shipfitter.

Q. And you worked as a shipfitter at Mare Island?

A. Yes.

Q. When did you come to the Territory of Hawaii?

A. The 16th of February, 1942.

Q. Did you come under a contract?

A. No, we volunteered to come over here and work.

Q. There was a general request made for mechanics and labor to come to Pearl Harbor, is that right?

A. Well, yes, they needed men immediately to do the work necessitated by the crisis here.

Q. And you responded to that call?

A. Yes.

Q. You have been here ever since?

A. Yes.

Q. And where have you been employed in that Territory of Hawaii?

A. At the Pearl Harbor Navy Yard. [289]

Q. As a shipfitter?

A. Yes.

Q. You worked at your job continually, have you?

A. Yes.

Q. From the time you arrived until just a few days ago?

A. Yes.

Q. Mr. Duncan, in February of this year you were employed as a shipfitter at the yard, were you not?

A. Yes.

Q. What shift did you work on?

A. The 11:00 to 7:30 shift.

(Testimony of Lloyd C. Duncan.)

Q. Is that what they call the graveyard shift?

A. Yes.

Q. You recall, do you not, the incident that happened on the 24th of February of this year?

A. Yes.

Q. On that day, Mr. Duncan, did you meet up with any boyhood friend of yours?

A. Yes, I did.

Q. What was his name? A. Bob Weities.

Q. Where is he from?

A. I met him in Sheridan, Wyoming, about seven years ago, and I have known him ever since.

Q. What was Bob's job?

A. Bob is a quartermaster on a ship and a merchant [290] seaman.

Q. Did you see him on the 24th of February this year? A. Yes.

Q. Did you have dinner together?

A. Yes, we did.

Q. Where did you eat? A. P. Y. Chong's.

Q. Approximately what time did you have dinner? A. About six o'clock.

Q. And after you had dinner, what did you do?

A. Well, we returned to my apartment.

Q. Did you have anything to drink at your apartment? A. Yes, we did.

Q. What did you have to drink?

A. Well, we drank beer and some whiskey.

Q. What time did you leave for your work at Pearl Harbor? A. About nine o'clock.

Q. Did Bob accompany you? A. Yes.

(Testimony of Lloyd C. Duncan.)

Q. How did you get down to Pearl Harbor?

A. We rode an H.R.T. bus.

Q. What time did you get down there?

A. Approximately 9:30.

Q. You were ready for work?

A. Yes. [291]

Q. Your shift began at what hour?

A. Eleven o'clock.

Q. Where was Bob supposed to be going?

A. Well, his ship was tied up in the channel off Aiea landing.

Q. And he had to return to the ship that evening, is that right?

A. Well, yes. I don't usually go to work that early, but he had to be in the yard by ten o'clock, so we left early.

Q. Is there any means of transportation from the gate to Aiea landing?

A. Yes, there is a truck that distributes the merchant seamen around through the yard.

Q. You are quite familiar with that fact?

A. Yes.

Q. And you knew that full well prior to the 24th of February this year? A. Yes.

Q. When you went down to the yard, you went to the main gate, did you? A. Yes.

Mr. Enpis: If the Court please, I wish to object to this line of testimony as having no apparent relevance in this Habeas Corpus proceeding to the issues presented by the pleadings. The Government has no desire to be particularly strict about

(Testimony of Lloyd C. Duncan.)

the admission of testimony, and I have listened for [292] about five minutes and I fail myself to see the relevance of what the Petitioner's dinner companion's activities were on that day.

Mr. Anthony: Just preliminary, your Honor. I will now get to the issue.

Q. Tell the Court in your own words what you and Bob did after you arrived at the gate.

Mr. Ennis: I object, your Honor, on the grounds that apparently Counsel believes that he can retry in this Habeas Corpus proceeding the issue which was tried before the provost court. Now, I think the Supreme Court for a hundred years has had this matter before it, that is, the matter of Habeas Corpus, as to what issues will be tried when the jurisdiction of another court is questioned. And the Supreme Court's decision makes it very clear that the only thing in question is not the facts in the former trial but the question of whether the other court had jurisdiction of the offense and jurisdiction of the person, of the defendant who is seeking habeas corpus.

Now, if it is Counsel's intention by these questions to have the Petitioner recount the incident which resulted in his provost court trial, I think it is clearly inadmissible under the decision. And if that is the line of testimony, I'd like to argue the point at some length, your Honor.

Mr. Anthony: That is my intention, your Honor, and I might say that this Petitioner is charged with having violated a military order. The Petitioner's

(Testimony of Lloyd C. Duncan.)

evidence will show that [293] he violated no military order. That's a fact. And the provost court is without jurisdiction to entertain his trial, irrespective of any other issue in this cause.

Now, I am prepared to argue that, if the Court cares to have argument. But I thought it was fundamental that in a habeas corpus proceeding the Court before whom the Petitioner makes his application is entitled to know the facts and circumstances surrounding the man's incarceration.

Now, I propose to show by this witness just exactly what transpired up until the time he filed his petitioner for habeas corpus, and, indeed, after that.

Mr. Ennis: I would like to be heard on that question, your Honor, because I think it is fairly fundamental matter in the case. The Supreme Court, in numerous habeas corpus cases, even including a case as recent as Ex parte Quiran, indicates rather plainly that the only question it has examined on habeas corpus is whether the court had jurisdiction of the offense, namely, whether in this case a provost court has jurisdiction of the offense of assault by a civilian upon a military sentry on a military reservation.

Now, of course, Counsel, as his petition indicates, may argu that a provost court under the present circumstances has no jurisdiction over that offense. But he cannot try here the question whether the particular facts constituting the offense were committed by Petitioner.

(Testimony of Lloyd C. Duncan.)

Now, as I say, the Supreme Court time after time has [294] repeated that on habeas corpus where a person imprisoned questions the legality of his trial by another tribunal, pursuant to whose judgment he is imprisoned, that the court will only examine the question of whether the offense charged was within that court's jurisdiction and will not examine the question of whether the facts of the particular case prove that offense.

Now, as it happens, the Supreme Court has had occasion in habeas corpus proceedings to consider offenses tried and convictions by military tribunals, such as Courts-Martial, and the rule is precisely the same in those cases. And I think those decisions are directly applicable here.

I have prepared a very brief and informal memorandum on this precise question, which I'd be glad to show your Honor and give Counsel a copy of it, unless you prefer me to present it at some length orally. I don't know what your Honor's practice is or what you feel is the preferable practice in the matter.

The Court: Present the essence of it as briefly as you can.

Mr. Ennis: Well, very briefly. I will hand the memorandum to your Honor for your Honor's convenience. The Supreme Court has repeated in numerous times in habeas corpus cases that the sole inquiry is the jurisdiction of the court, the jurisdiction question, and it has defined repeatedly that

(Testimony of Lloyd C. Duncan.)

[295] jurisdiction means jurisdiction over the person and jurisdiction of the offense.

Now, there is no question but there was jurisdiction of the person in this instance; the Petitioner was present in the provost court; he appeared and there was jurisdiction over his person. The only remaining question is whether there was jurisdiction over the offense. It is clear that the main issue in the case, as the pleadings set it up, is whether there is jurisdiction in the provost court over the offense of the civilian attacking a military sentry with intent to impede him in his official activity. And that question may be raised.

Now, it is a wholly separate and distinct question as to whether on habeas corpus, which explores and searches jurisdiction, the District Court here can examine not only whether there is jurisdiction over that offense in the provost court but whether there is also jurisdiction to retry the particular facts to determine whether that offense was committed.

For example, in Collins vs. McDonald, 258 U.S., involving habeas corpus to review the jurisdiction of the Courts-Martial, the Supreme Court said:

> "Did the court martial which tried and condemned the prisoner have jurisdiction, of his person, and of the offense charged, and was the sentence imposed within the scope of its lawful powers?"

And I have cited a number of cases to the same effect. In Knewel vs. Egan, 268 U. S., the Court states: [296]

(Testimony of Lloyd C. Duncan.)

prior testimony, that you were being called up at least for disorderly conduct?

A. That's the most I thought they could possibly charge me with.

Q. What did you do after you left the hearing or the provost court the first time on March 1st?

A. I went home and went to bed because I had to be [321] back to work that night at 9 o'clock.

Q. Did you make any effort to get the witnesses?

A. Well, they were gone by that time. They are not allowed to reveal the name of their ship, and they don't know when they are sailing, and the only way I have of getting in touch with this man is for him to come and see me. And when they do sail, they are not allowed to notify anybody, and he said he would be back if they were still in port. But he did not come back on the three following days, so he obviously must have left.

Q. What ship was Bol on?

A. I don't remember the name of the ship.

Q. But you do know the name of the ship?

A. I heard of it casually.

Q. Did you make any effort to find out whether the ship was gone?

A. I don't know the name of the ship.

Q. Well, I thought you just stated that you had known the name of the ship?

A. No, I said his ship was tied off the channel at Aiea and I never said anything about knowing the name of the ship.

Q. But did you know the name of the ship?

(Testimony of Lloyd C. Duncan.)

A. I had heard the name but I had forgotten it.

Q. Did you make any effort, after you had been in court the first day, to go down to see if the ship was still [322] in the channel?

A. Well, the names of the ships aren't written on them.

Q. And you just hoped that he'd come in and made no effort to find him?

A. Well, there was nothing I could do to find him; if he didn't come in, I'd have no way of getting in contact with him.

Q. Did you make any effort to get any other witnesses?

A. Well, I didn't think I'd need any witnesses.

Q. But you were told on March 1st by the provost court Judge or someone in the court about witnesses, asked as to whether you had any?

A. Yes. See, when I made the statement I was released: there was nothing said about me being charged later on for any offense. If any consideration had been granted me, then I could have—Bob came back to my house the following day, and if I would have known then that I was going to be tried four days later or three days later, I could have gotten a notarized statement from him then, and even if he had left I would still have some evidence in my favor or to present to the court.

Q. Now, when you appeared on March 2nd, didn't you state to the court, although your witnesses had left, you were ready to proceed with the case?

A. Well, I had no alternative.

(Testimony of Lloyd C. Duncan.)

Q. But you did state that? [323] A. Yes.

Q. Now, at your trial on March 2nd you heard the two marines testify against you, did you not?

A. Yes.

Q. After you heard them testify, after you heard the first one testify, did the court ask you if you wanted to ask him anything? A. Yes.

Q. And you said, no, you didn't? A. No.

Q. Now, after both of the marines testified, you were asked the same question as to whether you wanted to ask them any questions? A. Yes.

Q. And you said you didn't? A. No.

Q. In answer to a question by the court or by the prosecution, which is in the transcript in this way: "You didn't mind your own business in the first instance?"—didn't you answer, "I knew I was wrong?" A. No.

Q. You didn't answer that? A. No.

Q. Now, let me finish the answer. Then you knew, "that if anything happened I would be wrong." A. No, not in that particular place.

[324]

Q. Where did you make that answer?

A. Well, I don't just remember the exact wording of each exact paragraph, and from here I couldn't point out, I can't remember just exactly what transpired of complete words, but I explained to the court that I knew that if anything did happen and I was involved in any accident or argument at all, that I would be assumed wrong.

(Testimony of Lloyd C. Duncan.)

A. I had heard the name but I had forgotten it.

Q. Did you make any effort, after you had been in court the first day, to go down to see if the ship was still [322] in the channel?

A. Well, the names of the ships aren't written on them.

Q. And you just hoped that he'd come in and made no effort to find him?

A. Well, there was nothing I could do to find him; if he didn't come in, I'd have no way of getting in contact with him.

Q. Did you make any effort to get any other witnesses?

A. Well, I didn't think I'd need any witnesses.

Q. But you were told on March 1st by the provost court Judge or someone in the court about witnesses, asked as to whether you had any?

A. Yes. See, when I made the statement I was released: there was nothing said about me being charged later on for any offense. If any consideration had been granted me, then I could have—Bob came back to my house the following day, and if I would have known then that I was going to be tried four days later or three days later, I could have gotten a notarized statement from him then, and even if he had left I would still have some evidence in my favor or to present to the court.

Q. Now, when you appeared on March 2nd, didn't you state to the court, although your witnesses had left, you were ready to proceed with the case? A. Well, I had no alternative.

(Testimony of Lloyd C. Duncan.)

Q. But you did state that? [323] A. Yes.

Q. Now, at your trial on March 2nd you heard the two marines testify against you, did you not?

A. Yes.

Q. After you heard them testify, after you heard the first one testify, did the court ask you if you wanted to ask him anything? A. Yes.

Q. And you said, no, you didn't? A. No.

Q. Now, after both of the marines testified, you were asked the same question as to whether you wanted to ask them any questions? A. Yes.

Q. And you said you didn't? A. No.

Q. In answer to a question by the court or by the prosecution, which is in the transcript in this way: "You didn't mind your own business in the first instance?"—didn't you answer, "I knew I was wrong?" A. No.

Q. You didn't answer that? A. No.

Q. Now, let me finish the answer. Then you knew, "that if anything happened I would be wrong." A. No, not in that particular place.

[324]

Q. Where did you make that answer?

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(Testimony of Lloyd C. Duncan.)

Q. Well, here is the way it is in the transcript. Here is the question and answer. Isn't that correct? "You didn't mind your own business in the first instance? Answer. I knew I was wrong."

A. No, I didn't say that.

Mr. Anthony: Speak up so we can hear you, Duncan.

The Witness: No, I didn't say that.

Q. After the two marines testified, did not the court ask you if you wished to make a statement and explained that you had a right to make one?

A. Yes.

Q. And did you make a statement?

A. Well, I just said I'd like to clear up a few details there about the positions that the argument took place in.

Q. Now, in reference to your statement that you would like to clear up a few details, is this a correct transcript of your statement? (Reading.)

"I would like to clear up a few details. My [325] friend and I came through the gate. I was going to work and he wanted to get a truck that would take him to his ship that was berthed at Pearl City. I asked some marine—I don't know who it was—where he could get transportation. The marine told him that he could not go to his ship that way. He was very discourteous about it. I told him not to pay any attention to the marine, because I knew he could catch a truck back to the ship—and he did. Then this marine——".

(Testimony of Lloyd C. Duncan.)

Is that a correct transcript of what you said at that point?

A. No, I already knew where that truck was going and where the transportation was, so I never said in my testimony at all that I asked some marine. I never asked the marine anything.

Q. Well, will you show me, Mr. Duncan, what part of this statement is correct and which part is incorrect?

A. Well, I can't remember the exact words, every exact word that I said. You realize that?

Q. Yes.

A. Well, in the essence here, this first part is correct, "I would like to clear up a few details. My friend and I came through the gate. I was going to work and he wanted to get a truck that would take him to his ship." That was Aiea and not Pearl City.

Q. Pearl City is incorrect here, too?

A. Yes. And that I asked some marine, that is incorrect. I knew where I was going. I didn't ask them. And then this marine, this was Bob that asked the marine about the particular spot that this truck was going. I knew where [320] the truck was going. And the marine told him that he could not get to the ship that way, and he was very discourteous about it. That's what he said.

Mr. Anthony: You'll have to speak up louder; we can't hear you.

Q. Well, now will you read the rest of this answer and tell me if that is substantially what you

(Testimony of Lloyd C. Duncan.)

said to the question by the marine. "Answer. I don't know which one. I didn't pay any attention to the marine. The one marine came over and started arguing about it." Is that right so far? Take your time.

A. In this statement where it says——

Q. Well, is it right as far as I read?

A. Well, yes, I think that is correct.

Q. "——said that he could not get to his ship that way—he would have to go to Pearl City." Did you say "Pearl City" at that point?

A. No, I never said "Pearl City" at all.

Q. Did the marine say "Pearl City?"

A. Yes, the marine said it.

Q. Repeating what the marine said?

A. Yes.

Q. So it is all right down to there? Now, let's continue. "I told him that this friend of mine wanted to catch the truck." Is that correct?

A. Yes. [327]

Q. (Continuing): "This marine, he was getting pretty sore and abusive about it." Did you say that? A. Yes.

Q. "Of course, I knew I was in the wrong."

A. No, I said that I knew I would be held wrong for arguing with him, that if any trouble at all, any friction at all, as far as that goes, then it would be their duty, as an officer of the law, that you would be assumed wrong.

Q. Well, let's continue. Did you say this:

(Testimony of Lloyd C. Duncan.)

"Then he grabbed for my badge like he was going to tear it off, and I slipped to one knee and he pulled my badge off over my head." Is that correct? A. Yes.

Q. So the transcript is correct in some places?

A. In some places.

Q. Let's continue this answer. "Then another fellow came over and took hold of me."

A. No, another fellow never had anything to do with me until I was sitting down.

Q. I don't know what happened. I'm just asking you if this is what you said. Did you say this sentence, "Then another fellow came over and took hold of me?"

A. No, this other marine—no, I didn't say that.

Q. Let's continue the rest of the answer. "He asked me to come over to the gate and sit down, which I did."

A. That was Bowerman that asked me, not the other one. [328]

Q. Did you say this? A. Yes.

Q. Did you say this: "I never resisted them at any time?" A. Yes.

Q. (Continuing): "This man said I was drinking, that's why they had a Navy Doctor examine me, and he pronounced me completely sober." Did you use those words?

A. Yes. But this man said instead of drinking he said I was drunk.

Q. No, but you said, "This man said I was drinking,—" you made that statement?

(Testimony of Lloyd C. Duncan.)

A. I made the statement that this man said I was drunk.

Q. Is this question and answer correct: "Question. After that you were arguing and using obscene language? Answer. It was just about a 50-50 proposition there?"

A. Well, this marine was shaking his club in my face——

Q. I don't want to ask you what happened in Pearl Harbor. What we are trying to get here is that the stenographer who was present did not take down this testimony accurately. So what we are trying to determine here is what questions and answers are correct. Now, is that question and answer correct? You just look at it. Is that what was said at the trial?

A. No, that's the essence but that isn't the exact wording. [329]

Q. Well, according to your recollection, was the question asked, "After that you were arguing and using obscene language?" Is that question correct? Were you asked that question?

A. After what? Now, this whole part here is —"Duncan, you do admit that when one of these marines told Weities that he could not come in through the gate—" —well, that is wrong because that never happened at all. We were already in the gate.

Q. I don't want to ask you that. Did the Prosecutor ask you this question? "Duncan, you do admit that when one of these marines told

(Testimony of Lloyd C. Duncan.)

Weities that he could not come in through the gate you told him that he did not know what he was talking about?" Did he ask you that question?

A. Yes.

Q. All right, now, is this your answer: "Yes, but I did not use profanity?"

A. No, I never told the marine anything.

Q. What did you tell the Prosecutor when he asked you that question?

A. I didn't tell him "yes."

Q. You didn't make this answer: "Yes, but I did not use profanity?" A. No.

Q. What answer did you make?

A. Well, on that question I explained to him there that [330] I had never spoken to the marine at all, that when I said the marine don't know what he was talking about I was talking to my friend, Weities.

Mr. Anthony: Just a minute, your Honor. I'd like to know whether that's what he said at the Provost Court.

Mr. Ennis: Well, I'm trying to get at that.

Mr. Anthony: Is that what you said at the Provost Court?

The Witness: Yes.

By Mr. Ennis:

Q. Now, you have stated that the Prosecutor asked you this question—right? A. Yes.

Q. Now, is it your contention now that you did not make this answer? A. Yes.

Q. What answer did you make?

(Testimony of Lloyd C. Duncan.)

A. That's what I told him, I never spoke to the marine at all, that I had just addressed my remarks to Weities.

Q. Now, we have taken care of that question and answer. Now, let's go to the next question and answer. "After that you were arguing and using obscene language?" Was that question asked you?

A. Yes.

Q. Now, is this your answer: "It was just about a 50-50 proposition there?"

A. Yes, I said that. [331]

Q. Well, now, if you said that answer, Mr. Duncan, isn't that a statement that you were talking to the marine?

A. No, after that. See, this occurred——

Q. But it wasn't at the time you were talking to the marine?

A. After all this was heard, yes, I was talking to the marine.

Q. And the answer was "just about a 50-50 proposition" on the profanity, is that correct? That's the answer you made? A. Yes.

Q. Was that a fact, too? A. Yes.

Q. It's also correct, I understand it, that although you made these statements, you did not question the marines about their story?

A. No.

The Court: We will take a recess at this time.

(A recess was taken at 10:25 a.m.)

(Testimony of Lloyd C. Duncan.)

After Recess

Cross-examination

(continued at 10:40 a.m.)

Mr. Anthony: Your Honor, if I may clear up with Counsel's permission at the moment—I have issued a subpoena addressed to the Governor of the Territory to testify in this case. There is some question whether or not the Attorney General of [332] the Territory will take the position that the Governor is not subject to compulsory process of this Court. And I have assured the Attorney General of the Territory that I'd be very glad to withhold actual mandate of the Court and give him an opportunity to argue that in the event he does care to argue that question before your Honor. I'd just like to tell the Court that now because the Attorney General is present at this hearing. If he does take the position that the Governor is immune from the process of the Court and cannot be obliged to testify, that question can then be argued out at some time that is convenient to your Honor.

Mr. Tavares: If the Court please, we would like to be heard on those questions, and I have asked Mr. Kidwell up here from the Attorney General's Office to argue the point in Court if the Court will permit him to do so. It seems to me that the subpoena of the Chief Executive of the Territory is a matter that does justify some consideration by the Court before he is hailed over here and held to testify.

The Court: Well, I'd be very much interested

(Testimony of Lloyd C. Duncan.)

Q. At the end? A. Yes.

Q. I see. Let's go on to the next part of that answer. Did he say that at the trial?

A. No. He said some of these things but he didn't say them in that order or at that time. [344]

Q. Well, did he say at that time—which are some of the things he said at that time? Just mention them. Look at that paragraph and mention them.

A. Well, he said I refused to sit down and that I'm a civilian and not a service man, you can't arrest me. He said that all that happened when I was out in front and I was sitting on the bench, and he told me to come out in front and I moved out when he told me.

Q. And he did say that you said these things?

A. Yes.

Q. Did he say that all the time you were calling them filthy names and that you said if you ever met up with them you would kill them?

A. Yes.

Q. He said that? A. Yes.

Q. Now, how about the next question and answer? Is that correct?

A. No, he said—the question was: "Bowerman, prior to this altercation did you have occasion to put the defendant under arrest at the time you told him to shove off?" And he said: "No, sir. I told him to shove off and then I turned my back to him." Well, he didn't say that at all but he said: "No, sir. I told him to shove off." What he said

(Testimony of Lloyd C. Duncan.)

at the trial was, "No, sir. I told him to shove off, and then he hit me in the mouth." [345]

Q. That's what he testified to in the trial?

A. Yes. And here he says "I told him to shove off and then I turned my back to him."

Q. Now, look at the next question and answer. Is that correct or in your recollection was a different question and answer asked?

A. Yes, that's——

Q. That's correct? A. Yes.

Q. How about the next one, now? "Question. Did he do either one—proceed on into the Navy Yard, or else leave the gate?" Was that question and the answer to it made at the trial?

A. No, he didn't say that. He said—it says here: "No, sir. He stood right there and argued with me in the middle of the intersection after I told him to step over to the side." He never said anything about moving over at the trial.

Q. Well, how about the next question and answer? "Did he do either one—proceed on into the Navy Yard, or else leave the gate?"

A. That was a question.

Q. How about the answer?

A. Part of the answer is wrong.

Q. What part?

A. Well, he says that "He stood right there and argued [346] with me in the middle of the intersection after I told him to step over to the side."

Q. What part didn't he say?

(Testimony of Lloyd C. Duncan.)

in hearing upon what theory the argument you make, and what, if any, authorities you can present to the Court on that subject.

Mr. Tavares: In other words, your Honor, we don't want the Governor to be in the position of even appearing to disobey the mandate of this Court, and before he is put in that position or put in the danger of either doing that or doing something that we perhaps feel he shouldn't do, that we had [333] better be heard on it.

The Court: Very good.

Mr. Tavares: Of course, if the Court so orders, I don't believe there will be any question of what will be done.

The Court: Do you want to take that up at half-past one this afternoon?

Mr. Anthony: It's agreeable to me, your Honor.

Mr. Tavares: Yes.

Mr. Anthony: I don't know whether the Attorney General, or rather the United States, has any interest in this, but that's agreeable to me.

Mr. Ennis: The time is agreeable, yes, your Honor.

The Court: Let that be set down for argument at that hour, then.

By Mr. Ennis:

Q. Mr. Duncan, I have here the transcript of the testimony before the Provost Court about which you have been testifying, and, so far as we can, I would like you to indicate that part of the testimony which upon your recollection is a correct

(Testimony of Lloyd C. Duncan.)

statement of the questions and answers. Now, taking these preliminary questions by the Court, I believe you have already testified that the first question and answer, and the second question and answer, are correct. Will you look at that and tell me if that is true?

A. Well, the first preliminary questions seem to me to be, the actual questions and answers were longer; they have [334] omitted a lot, maybe not important things, but they have omitted a lot—well, I'm sure they asked me more than that, like: "I asked you yesterday if you had any witnesses and you said that you had two Mainland friends, but that their ship had left. Is that right?" Well, that was supposed to be the remark of the Court. Well, there was more to it than that.

Q. What else?

A. Well, I don't recall the words.

Q. Well, was there anything more in substance than that? A. Yes.

Q. Well, if there was more, will you be able to tell us what it was?

A. Well, I have already explained to you that I don't think any human being can recall the exact words that was said.

Q. I know. But you said that there was something more asked. If you know something more was asked, don't you know what the subject matter was?

A. Well, it was about Counsel and what I could

(Testimony of Lloyd C. Duncan.)

do to get these friends there, and he asked also that if the other men were present, and——

Q. Well, is this preliminary statement correct, the very first paragraph?

Mr. Anthony: Just a minute, your Honor. That's not testimony at all. That's one thing we'd like to know, how [335] that got in the transcript.

Mr. Ennis: Well, I'd like to explain that to Mr. Duncan. Does this first paragraph——

Mr. Anthony: May I address the Court, please? I don't think that Mr. Ennis is competent to explain that. This purports to be what transpired down at the trial. And without any preliminary introduction at all, we have a paragraph that is put in there evidently by the stenographer. We don't know who said what or what happened, and I think neither does Mr. Ennis.

Mr. Ennis: Well, I asked the witness this question: at the beginning of the hearing, did the Court ask you if you desired Counsel?

A. Yes, on the first day.

Q. On the second day, on March 2nd, did the Court ask you that question?

A. If I remember correctly, he made some remark that if I didn't ask for Counsel or didn't have any that we'd proceed.

Q. And what did you say?

A. He asked me if I was ready and I said Yes.

Q. And the Court did mention Counsel and then asked you if you were ready? A. Yes.

(Testimony of Lloyd C. Duncan.)

Q. Did the Court ask you if you had witnesses on the second day? [336] A. Yes.

Q. And what did you tell the Court?

A. Well, I explained at some length what had happened and that I had no way of myself producing them, that under the circumstances I could do nothing else but proceed. I didn't have any idea that I could tell them, well, I wasn't ready and they'd have to wait until I got some witnesses.

Q. What was the last day in which you saw Weities?

A. About the 25th, the day after this incident happened.

Q. Do you know what was the last day your brother saw him?

A. Well, my brother saw him the day before.

Q. Was he at your house on March 1st, the first day you appeared before the Provost Court, or in any day after? A. No, no.

Q. Did your brother see him on March 1st or any day after that? A. No.

Q. Do you know whether any of your friends saw him on March 1st or any day after that?

A. No.

Q. You don't know? A. No.

Q. Well, now, let's go on to the testimony of Marine Corporal Robert Carl Bowerman. You heard Corporal Bowerman give his testimony against you? [337] A. Yes.

Q. And when you were offered the opportunity

(Testimony of Lloyd C. Duncan.)

to question him, you said you had no questions to ask him, is that correct? A. Yes.

Q. Now, will you look at the testimoy, the transcript of the testimony which Corporal Bowerman gave as indicated by this transcript, and tell me whether that is correct in your recollection. Here is a copy (handing witness a typewritten document) you can use yourself, and I will use this one. Are the first preliminary questions correct?

A. To the best of my knowledge, yes.

Q. Well, then, will you turn over to the next page. Is the first question and answer correct?

A. Yes.

Q. Your answer is Yes?

A. No, this is Bowerman's testimony.

Q. Your answer is that the transcript is a correct report of the question and answer, is that correct? That's what he said? A. Yes.

Q. And the second question and answer on that page?

A. That, yes, that's correct. "Your were on duty at that time?" Yes, that's correct.

Q. Now, the next question, which comes to the merits of the case. "Explain the circumstances in your own words surrounding your coming in contact with this defendant." [338] Was he asked that question, just the question? A. Yes.

Q. That is correct?

A. That's right, correct.

Q. Now, will you read the answer he made? And is the first part of that answer what he said?

(Testimony of Lloyd C. Duncan.)

Never mind whether he was telling the truth, but is that what he said?

A. Well, part of it is and part of it isn't.

Q. Well, is it correct down to where the Court made the statement, "Tell everything you know about this?" Are those first eight or nine lines correct?

A. Well, yes, as far as I can remember.

Q. Now, reading beyond that, will you tell me the first place in his testimony that you come to in which, according to your best recollection, he did not say what appears in the transcript in your hands, or the first place where, according to your recollection, something he did say is not reported?

A. Well, he said here, "I told him that there was no bus going to his ship tied up at Pearl City and that Weities could not enter the Yard." He never said that at all.

Q. He didn't say it at the yard or at the trial?

A. He didn't say it at the trial.

Q. I see. You keep that in mind, we are just talking about what he said at the trial. Well, did he say anything else at that point in the testimony instead of that?

A. Well, this is inaccurate in a lot of places as to [339] what actually took place.

Q. We are not talking about what took place in Pearl Harbor?

A. No, I'm talking about the trial.

Q. Fine. I see. It is accurate down to the place that you have mentioned, namely, "I told him

(Testimony of Lloyd C. Duncan.)

that there was no bus," etc.? Is it accurate down to that sentence?

A. Well, you are trying to make me admit that I can remember everything that is said. If something didn't happen that I should remember that, too?

Q. No, here's what I want to do. You have said that the transcript of this testimony is wrong in places. A. Yes.

Q. Now, I think in fairness, if we can, we would like to work out what part, according to your recollection, is correct, so that we will know what part you claim is wrong. And all I want you to do is to tell me what part you think is correct and what part you think is wrong, and according to the best of your ability, I would like you to tell me what you think is left out.

A. Well, I can't remember everything that happened in the exact chronological order. It's impossible. But he says here, the question was: "With his right hand or his left hand? Answer. His right hand come up and struck me in the mouth." Well, there was no testimony which fist hit exactly what place. The testimony at the trial was, the man [340] said that I beat him and I hit him and I slugged him and I kicked him, and I didn't kick him with my left foot on the right shin or anything like that.

Q. So he did not answer, he did not make the answer: "His right hand came up and struck me

(Testimony of Lloyd C. Duncan.)

in the mouth?" He did not make that answer?

A. Well, the general theme of this is wrong, too. I mean what actually took place. This has been rewritten or something, because the actual testimony was different than this. In some places they have actual sentences in it, but they have me saying things here that I never said.

Q. Well, I want to work out with you by going page by page, as well as we can, since you have charged that the transcript is incorrect, it is fair that you should tell us to the best of your recollection in what way it is incorrect and admit in what way it is incorrect.

A. Well, it says here, "Question. One time?" That means how many times I hit him. And his answer was supposed to have been: "Yes, sir—one time he missed, and then he swung and hit me. Then Pfc Hunter jumped in to help me subdue him. He jerked loose and he hit me again below the eye, and he hit Hunter several times."

Q. Didn't he say that at the trial?

A. No. He said that when he told me to move on that I had assaulted him and struck him. There was no mention made about me missing or anything like that. [341]

Q. Did he say that Private Hunter jumped in and helped him?

A. Yes, he said Private Hunter jumped in and helped him.

Q. He did? Did he say that you jerked loose and hit him again below the eye?

(Testimony of Lloyd C. Duncan.)

A. No, he said when I hit him that I was sitting down, that I gave him several uppercuts.

Q. Did he say that you hit Hunter several times?

A. Hunter said I kicked him.

Q. Did Bowerman say that you hit Hunter?

A. Well, I don't remember that.

Q. You don't remember? You don't remember that he didn't say it or do you?

A. Well, no, I can't remember his exact words, everything he said or didn't say.

Q. Well, now, before we leave this page—we are down at the bottom of it—let's go back to this previous paragraph. You remember that he did say that there was traffic coming in and a lot of officers and Navy nurses were coming?

A. Yes, he said that.

Q. And that the Captain of the Yard, Admiral Ghormley—he said that? A. Yes.

Q. This obscenity which he attributes to you, did he say that at the trial? [342] A. Yes.

Q. Did he say that he walked up to you to take your badge for identification?

A. Yes, he did.

Q. And is the rest of it correct? "We always have to secure the badges of those we arrest, and he swung at me and missed me." Did he say that?

A. He said I swung at him and hit him.

Q. Did he say he took you by the arm to get you out of the intersection?

A. We weren't in the intersection.

(Testimony of Lloyd C. Duncan.)

Q. No, but did he say that?

A. Yes, he said that.

Q. Did he say the traffic was tied up?

A. Yes.

Q. And there was confusion? A. Yes.

Q. Did he say that he asked you to give him your badge? A. No.

Q. He didn't say that? A. No.

Q. Did he say that you said you were not going to give him the badge? A. Yes, he said that.

Q. He said that? Did he say that you struck him in the mouth? [343] A. Yes.

Q. He did? A. Yes.

Q. Well, now, turn the page. Do you recall whether the first question and answer was stated as it is reported here?

A. Well, this answer here, where he says, "Yes, sir. There is just a little mark there now. All the time he was cursing and yelling that if he ever got loose he was going to kill us. I finally got his badge from him." Well, where he said where "he was cursing and yelling that if he ever got loose," he said that I was sitting out in front and he pushed me on the bench.

Q. But he made that answer to a question at the trial? Did he say this at the trial?

A. Well, he said that at the trial but not in this place.

Q. Well, in what place did he say this?

A. Well, this sentence here occurred right at the very last.

(Testimony of Lloyd C. Duncan.)

A. Well, that part about "I told him to step over to the side."

Q. He didn't say that?

A. He didn't say that.

Q. Did he say the part about the arrest?

A. Yes, about the badge, "we tried to secure the badge."

Q. With that correction is the answer correct to your best recollection?

A. The answer is wrong.

Q. In that respect?

A. Yes. Here, when he said, "When we put a man under arrest," he said "we always try and secure their badge so they can't escape," were the words he used.

Q. Well, now, how about the next question and answer, did this happen at the main gate at Pearl Harbor, is that correct?

A. Yes, that is correct.

Q. The next question and answer, about wrestling on the pavement, and the answer, "We had to take him off the intersection." Is that correct?

A. Well, we weren't wrestling on the pavement.

Q. But was he asked that question?

A. No, not in those words. I think he used the word [347] "scuffle," "Did you scuffle with this man on the pavement?"

Q. How about the answer? "We had to take him off the intersection." Did he say that?

A. I think he said "No."

(Testimony of Lloyd C. Duncan.)

Q. You think he said "No, we didn't have to take him?"

A. No, he just said "No." When he asked him, "Did you have any occasion to wrestle with him on the pavement," the man said "No."

Q. The witness said "No." All right, how about the next question and answer? "Did he resist you at that time?" "Answer. Yes, sir, he was swinging at me." Did he say that?

A. Yes, he said that.

Q. He did? How about the next question and answer? "Did you see him——"

The Court: Are you going all the way through this?

Mr. Ennis: Well, if the Court please, the witness has undertaken to say in a very general way that this transcript is incorrect, and there seems to be no other way to find out what part he admits and what part he doesn't except by going through it.

The Court: All right.

Mr. Anthony: I suggest, your Honor, that there is another way. If this transcript was taken by a competent court reporter, to produce the court reporter; unless this Court is satisfied that the Petitioner has not pointed out errors in the transcript, the Court naturally would accept the production [348] of the court reporter, if there is a court reporter.

Mr. Ennis: Well, I agree to that, your Honor. The Government will prove this transcript, but in

(Testimony of Lloyd C. Duncan.)

addition to proving it I think another purpose is served since the Petitioner has made this quite extraordinary, unusual charge, to find out in just what respects he claims that. I don't think that on the Court records a general charge that the transcript is wrong should be allowed to stand. Although it may appear tedious, it is proper cross examination to try and make it as definite as we can.

The Court: Well, if you can rebut the general charge—what is the value of all the details?

Mr. Ennis: Well, I think it is of value in your Honor's determination on the question to know what his best recollection is.

The Court: All right, follow your own ideas.

Mr. Anthony: Your Honor, I have some witnesses under subpoena. I think we'd better excuse them, as it will probably take an hour or so to do this.

Mr. Ennis: I don't think so. Wait a few minutes and see how far we get.

By Mr. Ennis:

Q. Do you see the last question and answer on that page, Mr. Duncan? A. Yes.

Q. Was Bowerman asked whether he saw you hit Hunter [349] and did he answer Yes, that Hunter was next to him, and did you strike Hunter with your fist? Did he say that?

A. Yes, he said that.

Q. All right, now, let's turn to the next page and see how quickly we can get along with this. How about the next question and answer?

(Testimony of Lloyd C. Duncan.)

A. Yes, I said that.

Q. And the next one? He was asked whether he hit you and he answered he didn't.

A. He said, "Did you have occasion to hit this man in any way during this—" he might have asked that question.

Q. Well, what was his answer? Well, now, come —you recall this incident? Surely the Prosecutor asked the witness whether he hit you when he was testifying that you hit him?

Mr. Anthony: What page of the transcript?

Mr. Ennis: This is the top of page four; it is page four of this, and it is at the bottom of page two according to those page numbers in the middle of the transcript; the top of page four in your copy.

Q. Certainly he was asked whether he hit you and answered he didn't—you recall that?

A. Well, I don't recall that that question was even asked.

Q. You don't? A. No.

Q. Do you recall the next question that is similar? [350] "You never injured him in any way? Answer. No, sir."

A. He might have asked that question, but I don't think he asked the one before that.

Q. How about the next one, that the marine simply told you to shove off, and when you resisted, took you into custody?

A. Yes, he asked that question.

(Testimony of Lloyd C. Duncan.)

Q. How about the next one, whether there was congestion or not, and the answer that there was congestion? A. Yes, that is correct.

Q. And the next one? A. Yes.

Q. And the next answer explaining the system of checking? A. Yes.

Q. How about the next one, "Had the defendant been drinking?" And the answer? Did he describe your condition in that way?

A. No, he never said anything about I could stand on my two feet and take care of myself and that I walked up to the sentry. He said he could smell liquor on my breath.

Q. And that your eyes were bloodshot and your face flushed?

A. Yes, he said that. And that I had the look of an angry man. That's what the man said in the trial, but it doesn't appear there.

Q. Now, do you recall any other questions and answers [351] that were asked of Bowerman?

A. No.

Q. You can't recall that there are any other questions or answers which are missing from his testimony? A. No.

Q. Well, now, did the Court ask you the question, "You may ask the witness any questions," and you answered, "I have nothing to say to him?"

A. Yes.

Q. That is correct? A. Yes.

Q. Now, the next preliminary questions about Hunter? A. Yes.

(Testimony of Lloyd C. Duncan.)

Q. They are all right? A. Yes.

Q. Now, just read down on the next page the questions and answers and tell me as soon as you come to an answer that you think is wrong or a question that you think was not asked.

A. Well, this question, "You had occasion during the performance of your duties to come in contact with the defendant, Duncan?" And his answer was, "Yes, sir. At that time I was checking incoming vehicles, and the defendant came up to me and asked me what we were going to do with his buddy." Well, he never said any of that.

Q. At the trial? A. No. [352]

Q. What did he say?

A. He said, right in this transcript, he said when I was sitting down I was giving Bowerman some trouble, and he came over and helped Bowerman subdue me. He says in here—that's the first time he saw me——

Q. Is that his answer to this question, it should begin with, "Then I saw Bowerman having some trouble with him——" is that part correct right in the middle there? A. Yes.

Q. He said that? A. Yes.

Q. Read from there on. Stop when you come to something that he didn't say.

A. Yes, he said that part.

Q. And he didn't make this preliminary, he didn't say this preliminary part about checking the cars?

(Testimony of Lloyd C. Duncan.)

A. He said I accosted him—well, he didn't say that at all.

Q. He didn't say that in his testimony?

A. No.

Q. How about the next question and answer, "Were there people standing around to hear the profanity?" A. Yes.

Q. The next question and answer?

A. He never said that at all.

Q. How about the question? Was the asked the question, [353] "Were you in close proximity to Bowerman to hear Bowerman say to either shove on or else go into the gate?" Was he asked whether he was near enough to hear it?

A. Yes; he was.

Q. And what did he say? He was at the gate with Bowerman, wasn't he?

A. Well, I don't remember what he said.

Q. Well, do you remember that he didn't say this? Do you remember that he didn't testify that he was near enough to hear what Bowerman said to you? A. He said he was close enough.

Q. He did say that? A. Yes.

Q. O.K. Fine. Do you know about the next question, "do you know whether Bowerman put him under arrest," and the answer, "he put him under arrest?" A. Yes, that is correct.

Q. And the next one, "Did you try to assist Bowerman in the arrest of this defendant?" And the answer, "No, sir. Bowerman had already placed him under arrest." Did he say that?

(Testimony of Lloyd C. Duncan.)

A. No, he didn't say that.

Q. He didn't say that? A. No.

Q. How about the question? Was the question asked?

A. I don't remember that that question was asked or not. [354]

Q. You don't remember? A. No.

Q. Do you remember that it wasn't asked?

A. No.

Q. You don't remember whether any answer was given or not? A. No.

Q. How about the next one?

A. Yes, I think that question was asked.

Q. How about the next question, "did you see Bowerman grab hold of defendant's badge and swing and wrestle him around?"

A. Yes, he was asked that question.

Q. Did he make that answer?

A. Yes, he made that answer.

Q. How about the last question and answer on that page?

A. That question wasn't asked at all.

Q. Do you mean to say that the Prosecutor didn't ask this marine sentry whether or not he or Bowerman struck you?

A. He asked this already up here.

Q. Well, he asked Bowerman but didn't he ask Hunter whether they struck you?

A. He might have.

Q. He might have? You don't remember?

A. No.

(Testimony of Lloyd C. Duncan.)

Q. All right. Turn over the page and let's go ahead with this. [355]

A. On this question, "Did you see any club?" —that never occurred at all.

Q. Well, did you hear the Court say, "Refrain from leading questions?"

A. The Court went at some length to explain to this Attorney that he had been continually leading the witness and that he asked him once again and given him a short reprimand, and another time, if I remember correctly, he reminded him of it.

Q. Did he put it in that language, "Refrain from leading questions?"

A. He said, "You will refrain from the practice, you are leading—or continually leading—the witness, and you will refrain from the practice."

Q. How about the next question and answer?—how did you hold on to the defendant when you arrested him, when he resisted arrest? Did he say that?

A. No, he never asked how they grabbed hold of me or anything like that.

Q. He didn't ask that question? A. No.

Q. And that answer wasn't given?

A. No.

Q. Didn't they at any time ask the witness to explain how they took you into custody?

A. They have already explained it in here. [356]

Q. But they didn't ask it there or didn't they ask this witness? A. No.

Q. Did the Court ask you if you wanted to ask

(Testimony of Lloyd C. Duncan.)

them any questions when they were finished and you answered, "No, sir?"

A. Well, the Court at that time asked me this what it says here: "As I indicated before, you may at this time make a statement if you wish, or you may let the case rest upon the prosecution's evidence. If you wish to make a statement you have the right to do so."

Q. That was explained to you by the Court, wasn't it? A. Well, yes.

Q. Well, is that the statement you made?

A. Well, I don't recall him saying anything about "if you wish," "as I indicated before, you may at this time make a statement, if you wish." He asked me if I'd like to make a statement or say anything, or you may let the case rest upon the prosecution's evidence. He may have said that.

Q. Well, how about your statement? You did make a statement after he made a remark like that at that time?

A. Yes. This next statement by me is incorrect. I did say "I would like to clear up a few details," and that "my friend and I came through the gate. I was going to work and he wanted to get a truck that would take him to his ship that was berthed at Pearl City." I didn't say "Pearl City." [357] I said "Aiea."

Q. O.K. Continue. Do you want to make any other correction in that answer?

A. Yes, "I asked some marine—" none of the rest of that occurred there.

(Testimony of Lloyd C. Duncan.)

Q. And you didn't say any of the rest of that?

A. I never said from here on, "I asked some marine—I don't know who it was—where he could get transportation. The marine told him that he could not go to his ship that way. He was very discourteous about it." I never interrogated any marine.

Q. Did you say, "I told him not to pay any attention to the marine?" A. Yes.

Q. And this was inside Pearl Harbor gate?

A. Yes.

Q. Did you think that was the right thing to do?

A. I told him not to pay any attention to the marine, not violating any rule, but that the marine had given him misinformation and that the man was wrong; whether he would admit it or not, that's immaterial. And I knew what I was doing and I told him that the marine was wrong and get to the truck and he'd be sure to get back, because I knew.

Q. How about the next question and your answer?

A. He asked me which marine, and I said I don't know. I didn't pay any attention to which marine it was. And then [358] this one marine, Bowerman, came over. That part occurred.

Q. That is correct? That's what you said?

A. Yes.

Q. "——and started arguing about it—said that he could not get to his ship that way—he would have to go to Pearl City." Did the marine say

(Testimony of Lloyd C. Duncan.)

"Pearl City" when you said "Aiea?" The marine used the word "Pearl City", didn't he?

A. Well, the ship wasn't at Pearl City. It was at Aiea. Whether they used the word "Pearl City", I don't remember.

Q. How about the rest of that language? "I told him that this friend of mine wanted to catch the truck." Did you speak to the marine at that time?

A. Well, when the marine gave him misinformation, well, I don't know, maybe I'm digressing here but I have to explain it in my own way. When the marine told him he couldn't go in the yard, he'd have to go around, why then I told him that this was the truck; I knew it was; and he wanted to go back. And the marine asked me why I was butting in, and I explained to him that I knew where he was going and what he had to do, and the marine got abusive because I contradicted him.

Q. Well, now, that's what happened at Pearl Harbor? A. Yes.

Q. Well, let's go back to your answer to the Provost Court. Did you say to the Provost Court that a marine came over and started arguing about it? A. Yes. [359]

Q. And said that he could not get to the ship that way but would have to go to Pearl City? Did you say that to the Provost Court?

A. Yes, I said that.

Q. Then did you say the rest of that answer, "I told him that this friend of mine wanted to catch

(Testimony of Lloyd C. Duncan.)

the truck. This marine, he was getting pretty sore and abusive about it."—you said that, didn't you?

A. Yes.

Q. How about the next sentence: "Of course, I knew I was in the wrong—then he grabbed for my badge like he was going to tear it off, and I slipped to one knee and he pulled my badge off over my head."

A. I didn't say I was in the wrong. I said I knew I'd be held responsible for anything that went wrong.

Q. But the rest of it you said?

A. I mean the marine could arrest me or maybe cause me a lot of trouble for talking back to him.

Q. Well, did you say that the marine grabbed for your badge like he was going to tear it off and you slipped to one knee and he pulled it over your head?

A. I said this marine grabbed a hold of my badge. He didn't ask me for my badge. He just grabbed a hold of it, and jerking me around; it didn't come off and he was jerking me around by the cord I have around ~~my~~ neck with my badge fastened on to it, and I slipped on the pavement there, and [360] he jerked the badge off my head.

Q. You said that at the trial? A. Yes.

Q. Now, look at the rest on the next page, the rest of the answer. Did you say that?

A. No, I never said "another fellow came over and took hold of me."

Q. You didn't say that?

(Testimony of Lloyd C. Duncan.)

A. No. And I did say to Bowerman—that is, "he asked me to come over to the gate, and sit down, which I did. I never resisted them at any time. This man said I was drinking——"

Q. "——that's why they had a Navy Doctor examine me, and he pronounced me completely sober." You did say that? A. Yes.

Q. Now, finish it up. "You mean Corporal Bowerman? Answer. No, the Navy Doctor." Did that occur? A. Yes.

Q. How about the next one? A. Yes.

Q. Then the Court asked you if you wish to ask any questions—no, that was to the Prosecution. That was not to you. I'm sorry. Now, read down there. Are those questions the Prosecution asked you and the answers correct? Well, you said some of them are correct already.

A. Well, this one here, if you will recall just a few [361] minutes ago I said no, that was not correct, that I told my friend, he asked me—the question was, "Duncan, you do admit that when one of these marines told Weities that he could not come in through the gate you told him that he did not know what he was talking about?" I said I made that statement not to the marine but to Weities.

Q. Wieties? A. Yes.

Q. Now, the next question and answer is correct, you testified before?

A. Didn't I explain that to you?

Q. Yes. Did the Prosecution ask you if you

(Testimony of Lloyd C. Duncan.)

had been drinking, and you said, Yes, the day before was your day off? A. Yes, I said that.

Q. And the next question and answer, "Had your friend been drinking also?" Did you say "Yes?" A. Yes.

Q. And did you answer that he had? When you were asked the question, did you answer it?

A. The next one, "You were told to shove off and you started arguing with the marine?" I said that, yes.

Q. How about the last one on that page?

A. He said here, "You do admit that you hit Corporal Bowerman with your fist?"

Q. Did he ask you that?

A. No, he never asked me that, because beforehand the [362] Judge had told him to refrain from asking leading questions.

Q. But he told him that in connection with the marines, not in connection with you?

A. No, he never asked me that question at all.

Q. He didn't ask you that question?

A. No.

Q. Well, then, of course, you didn't make that answer? A. No.

Q. Did you make that explanation any place in the case?

A. Yes, I told him how it was when he grabbed my badge. This man says that I was fighting with him, that I struck him and kicked him and I was beating him, both him and Bowerman at one time, and they were trying to subdue me. So I said that

(Testimony of Lloyd C. Duncan.)

Bowerman grabbed my badge, and I may have resisted him and I was trying to make him let go of me and take his hands off me.

Q. How about the next question and answer on the next page?

A. He has me say "they are" here. I said, "he", because Private First Class Hunter never had anything to do with this until I was sitting down.

Q. Well, did he ask you that question about whether roughing you up was purposeful or accidental, and did you answer you didn't know?

A. I said one of them hit me, in fact, with his club, and then actually at the trial I said it could have been accidental. [363]

Q. You did say that? A. Yes.

Q. That's what you think?

A. But that's not the way they have it here, though. And then I don't remember if it was purposeful or not—I did not say this: "No, I don't know. He had it in his hand. I was not resisting—I went where they told me." Well, none of that occurred right there.

Q. But you did say that you didn't know whether you were hit accidentally or on purpose?

A. I did say that the man hit me across the nose and made my nose bleed, and that it could have been accidental.

Q. Did you say that you went where they told you and gave them your identification?

A. Yes.

(Testimony of Lloyd C. Duncan.)

Q. And that if he had asked for your badge, you would have given it to him? A. Yes.

Q. And you "guess" you were "not moving fast enough for them?"

A. No, this place I explained to you before; that's completely incongruous with this preceding testimony.

Q. But did you say it? A. Yes.

Q. Did you say it at that place?

A. No. [364]

Q. How about the next question and answer? We are nearly finished here. Did you make the statement to the Prosecution, "I didn't like to be kicked around like that. I was not even talking to the marines in the first place. I was all ready to go to work and mind my own business."

A. Yes, I made that statement.

Q. How about the next question and answer? "You didn't mind your own business in the first instance? Answer. I knew I was wrong—that if anything happened I would be wrong." That's the kind of an answer you made, isn't it?

A. No, it wasn't like that. I told him that anything that happened, I would be assumed wrong.

Q. Did you use the word "assumed?"

A. I don't recall just the exact word.

Q. You don't recall the exact word? Now, how about these questions, the general questions that the Court asked you about your place you lived in and where you were employed and department, they are all correct? A. Yes.

(Testimony of Lloyd C. Duncan.)

Q. Down at the bottom about the record about the cigarettes, and your answer, is that correct?

A. Yes.

Q. Now, after those questions and answers by the Court, did anything occur at the end which is not in here?

A. Well, the gist of it. I don't remember actually the words. [365]

Q. You don't remember that there were other questions after these questions by the Court that were asked of you? A. No.

Q. Or of any of the other witnesses?

A. No.

Q. Now, you stated that the Judge acted as if you were guilty before you were tried. What do you mean by that?

A. Well, I assumed that, I thought that my own personal testimony would carry some weight and that there was no tangible evidence that I had beaten up anyone. In fact, the physical odds were in my favor, as far as odds against one man beating two armed marines.

Q. That's what's in your mind? But, Mr. Duncan, you testified—did you finish your answer?

Mr. Anthony: He hasn't finished yet.

The Witness: Well, I was—now you disturbed my train of thought.

Q. Well, let me ask you the question again. You stated that in Court before the trial started the Judge acted as if you were guilty, and I want you to explain not what was in your mind alone but

(Testimony of Lloyd C. Duncan.)

what did the Judge do that gave you that impression.

A. I didn't say this Judge. I think you said—I said that their attitude seemed to the Prosecutor that I was already guilty and that I had no evidence and no witnesses, and I thought my own testimony would carry some weight but that it [366] obviously didn't.

Q. Well, now, how about the Judge's attitude?

A. Well, it was strictly impersonal.

Q. Would you say it was impartial?

A. Well, I can't read his mind.

Q. Well, did you see anything in the Judge's attitude which indicated that he thought you were guilty before you were tried?

A. Yes, he never allowed me—I said I had no witnesses and he never explained to me that maybe he could delay the trial until I could get some witnesses. But he did delay the trial until the Prosecuting witnesses were presented.

Q. Well, you didn't ask him to delay the trial so that you could get the witnesses, did you?

A. Well, I never knew I had any alternative. I should think it would be the Court, as a matter of prestige and knowledge, I should think he would be considerate enough to let you know.

Q. Well, you didn't ask for a lawyer?

A. I didn't think they could possibly charge me with anything more than a disorderly conduct.

Q. How long did you work in Pearl Harbor?

(Testimony of Lloyd C. Duncan.)

A. Well, I worked there 25 months.

Q. Twenty-five months?

A. No, it will be 24 months.

Q. You had gone in the gate at Pearl Harbor night after [367] night or day after day?

A. I had gone through those gates for the last four years and never had even so much as an argument with them.

Q. You know in a general way that it is the duty of the sentry to keep order at the gates?

A. Well, but I wasn't being disorderly. The marine made the issue himself.

Q. But you did know when you were called up before the Provost Court that you were called up in connection with an incident in which, whether you were right or wrong, the marine put you under arrest? A. Yes.

Q. You knew that? And you knew you were being brought up to be tried in connection with that incident? A. Yes.

Q. And you did not ask for a lawyer?

A. No.

Q. But you willingly went on trial without a lawyer? A. Yes.

Q. Mr. Duncan, did you ever ask the Provost Court to retry any part of the case that you thought unfair?

A. No, I—my idea was in my own mind I had committed no crime; I had no motive for committing any crime, and I thought the most they could do would be to charge me—I did talk back to this

(Testimony of Lloyd C. Duncan.)

marine and I was guilty of a misdemeanor—why I was willing to pay for that. [368]

Q. Well, after you were sentenced to six months imprisonment, did you ask for any retrial or did you ask for any reconsideration of your case?

A. I was given no opportunity.

Q. Did you—so far as you know, has your lawyer ever asked for a retrial at the Provost Court case? A. No, I don't.

Mr. Anthony: That is immaterial, your Honor. I think the brother (referring to defendant's brother in Court) here would know, for your own information.

Q. Do you know whether your lawyer asked for a retrial at the Provost Court case?

A. No, I don't.

Q. Did you ask your lawyer to? A. No.

Q. You did not? So, so far as you know, you have not and no one on your behalf has asked for a retrial of that case in the Provost Court, is that correct?

Mr. Anthony: Just a minute. We are going pretty far afield with this nonsense about a retrial in the Provost Court. There is nothing in any General Order that permits any such thing, as Counsel well knows. Those cases are not reviewable, as a matter of right. I can write a nice letter to them. Maybe they'll look the paper over, but you can't have any true retrial in the sense that he has asked the witness.

(Testimony of Lloyd C. Duncan.)

Mr. Ennis: There is no limitation whatever on it, your [369] Honor. And as an individual he has testified here that he thinks now that he was unfairly dealt with. And I think it is perfectly permissible cross examination to ask the witness in testing whether that is his honest conviction, as to whether he has done anything to attempt to have that judgment against him reconsidered by the authorities who pronounced it.

The Witness: Well, if I assume——

Mr. Anthony: Just a minute, Duncan.

The Court: He said "No."

Mr. Ennis: What was your answer to that question?

The Witness: Well, I assume that the man that sentenced me did it from his own, it seemed to me from the evidence to him that I was guilty, and I never knew whether I had an opportunity—he had pronounced the sentence and I was a prisoner so therefore I had no opportunity to do anything about it.

Q. And you haven't, apart from bringing this action, you haven't done anything about it?

A. Well, I was prepared, I felt that—there's my friend Weities outside now. (Referring to a person entering the Court at that time.)

Q. Answer the question.

A. I mean I never knew that I had any witnesses, and my witnesses were gone, and that I had no evidence probably to get another trial, just my own testimony. And it had been disregarded in the

(Testimony of Lloyd C. Duncan.)

first place, so I just went on to jail prepared to serve my sentence. [370]

Mr. Ennis: That's all.

Mr. Anthony: Your Honor, I have some redirect, but I'd like to call some other witnesses that have been waiting around here.

The Court: All right.

Mr. Anthony: Step down now, Duncan.

(Witness leaves the stand.)

Mr. Anthony: Your Honor, the Deputy Attorney, Mr. Kidwell, advises me that it is not convenient to argue that motion for the appearance of the Territorial Governor this afternoon at 1:30. May we fix some other hour in which that can be argued?

Mr. Kidwell: Tomorrow afternoon would be all right. We would like to have it then.

Mr. Anthony: That is satisfactory to me.

The Court: Well, in the event that the Court should rule adversely to your contentions, will it delay the trial any if it is postponed until tomorrow?

Mr. Anthony: No, your Honor.

The Court: Tomorrow afternoon, then, Mr. Clerk, at 1:30 instead of today.

RILEY H. ALLEN,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please? [371]

A. Riley H. Allen.

Q. What is your occupation?

A. I am the Editor of the Honolulu Star-Bulletin.

Q. How long have you lived in the Territory of Hawaii, Mr. Allen?

A. Continually since 1910, except for the years 1918, '19 and '20.

Q. How long have you been the Editor of the Honolulu Star-Bulletin?

A. Since the forming of the two afternoon papers into the Honolulu Star-Bulletin, July 1st, 1912.

Q. Where were you born, Mr. Allen?

A. Colorado City, Texas.

Q. You're an American citizen, of course?

A. I am.

Q. Mr. Allen, as Editor of the Star-Bulletin and as a long-time resident of this community, have you had an opportunity to observe the conduct of the people in this community?

A. I should say in general terms, yes.

Q. Since December 7, 1941, will you please state what has been your observation as to whether or not this community has been an orderly, law-abiding community?

(Testimony of Riley H. Allen.)

Mr. Ennis: Objection, your Honor, on the grounds that that is not relevant to the issues in this case. We are not trying the community, on its law-abidingness.

Mr. Anthony: It is relevant to the paragraph in the [373] return which relates to what the public safety requires, your Honor. I could ask the Court to take judicial notice of what the public safety requires and judicial notice of the fact which we all here in this courtroom know, and that is, that this is a perfectly law-abiding, orderly community and nothing extraordinary has occurred other than the war itself. But rather than have all of that rest in judicial notice, I have decided to put on some proof, which I think is proper.

Mr. Ennis: Your Honor, we do not charge that the community is not an orderly and a law-abiding community, and I think that question is objectionable on that ground. The public safety, in any respect in which the public safety is involved, is only involved with respect to whether public safety requires martial rule and suspension of the privilege of the writ. And the question that is asked is not designed to elicit any information on that subject.

The Court: Apparently Counsel asked that question to emphasize something else. I don't know. Overruled. You may proceed.

Mr. Ennis: Exception.

Mr. Anythony: Do you recall the question, Mr. Allen?

(Testimony of Riley H. Allen.)

The Witness: I'd like to have the reporter read it.

(The Reporter read the last question.)

A. I should like to say that this has been an orderly and law-abiding community.

Q. Business has been conducted normally within the [373] limits of any wartime community's ability to do so?

A. Within the limits of the rules and regulations and restrictions which were observed here voluntarily or otherwise, I think, yes.

Q. Your paper, for instance, has been published continually, has it not? A. That's right.

Q. Theatres, bars, and places of amusement, do you know whether or not they are operated here in the Territory? A. At the present time?

Q. Yes. A. They are.

Q. How long have they been operated, in full operation, since December 7th, do you have any idea?

A. I can't state definitely what length of time the bars were closed, or the theatres, but I think within a relatively short time after December 7, 1941; they resumed operations.

Mr. Ennis: Your Honor, I object. That's rather indefinite. I don't know what the witness means by "a relatively short time."

Mr. Anthony: That's shown in the order, Mr. Ennis. Mr. Allen, at the outbreak of war there was a censorship of the press, was there not, in licensing of the press?

(Testimony of Riley H. Allen.)

Mr. Ennis: I object on the ground that that is irrelevant.

Mr. Anthony: I want to show that it doesn't exist now. [374]

The Court: Overruled.

Mr. Ennis: Exception.

Q. Do you recall, Mr. Allen?

A. There was, under military orders.

Q. The press was first also closed and then they were permitted to operate under license?

A. Some of them were permitted to operate.

Q. Will you state briefly, for the benefit of the Court, how the newspaper stories in regard to the events that have happened in this Territory which are deemed of military significance or public significance, are approved by the military authorities and released for publication?

Mr. Ennis: Objection on the grounds that that is irrelevant. I don't see what bearing on the situation of the public safety the details of the method of censorship has on the issues of the case.

Mr. Anthony: Well, that is just preliminary, your Honor. I've got a lot of material here that I am going to offer in evidence, and I want to prove to the Court that these things passed muster by the military authorities before they were permitted to be published.

The Court: Overruled.

Mr. Ennis: Exception.

The Witness: At the outbreak of war, we were first requested by the Department of Military In-

(Testimony of Riley H. Allen.)

telligence to do our own censoring in cooperation with the military authorities, [375] the statement being that they had full confidence that we would observe the same general rules of voluntary censorship that were enforced throughout the mainland or was in operation throughout the mainland. I requested that at that time so that we could be under no suspension or under no danger of carrying any news or information which might be of value to the enemy or in violation of military secrecy; that the Department of Military Intelligence or the Army appoint an officer or officers or deputy who would examine our newspaper and all issues of it and all matters going into it to see that we kept strictly within bounds. That was done after, I think, two or three days, and at that time two men who were experienced newspapermen then in civilian life were deputized or appointed by the Army to supervise all matters which went into the Honolulu Star-Bulletin, including advertising, news and pictures.

This carried along for some weeks, as I recall, and I was then requested to relinquish, if we could, these two men so that they might take up the duty of censoring the two Japanese billingual newspapers which it was then proposed to reopen. They were, accordingly, shifted from the Honolulu Star-Bulletin to the offices of the two Japanese newspapers, and one of our staff, our managing editor, was asked by the Army if he would assume a semi-official or quasi-official duty of acting for the censorship. This was done, and he has continued to

(Testimony of Riley H. Allen.)

act in that capacity, although there is no official designation [376] of him as such.

At that time, and since that time, we have endeavored at all times to observe the requirements, the rules, both of the national voluntary censorship and of such special restrictions as are considered desirable by the commanding officers of the Army and Navy or other branches of the Service.

Q. Mr. Allen, when the Military and Naval officers hold press conferences and give press interviews, you are permitted to quote them in some cases, are you not?

A. In most cases I should say yes.

Q. For instance, I have in mind an interview which the press had with General Emmons on January 1, 1942, in which General Emmons is quoted as saying:

> "The fortress of Oahu is, Gen. Emmons said, now able, in conjunction with the Navy, to defend Hawaii against any invasion attempt the Japanese at this time are likely able to muster."

Were you present at that interview, do you recall? Wait a minute. I'll hand it to you. (Handing witness a newspaper clipping.)

A. To the best of my knowledge, I was present. I was present at several interviews at which he received the press, and I believe I was present at this time.

Mr. Ennis: What's the date of that interview?

Mr. Anthony: That's January 1, 1943. Now,

(Testimony of Riley H. Allen.)

Mr. Allen, the general press stories relating to the progress of the war, are they cleared by the correspondents through the Military [377] or Naval Intelligence, do you know, before they are published?

A. Most of them are so cleared, where there is any question as to their advisability they are always cleared. And in a number of cases the news stories are based, are actually reproductions of mimeographed releases by the various commands or offices.

Q. Will you please glance through this folder rapidly? (Handing witness a folder.) Are you able to recognize those as newspaper clippings either coming from the Honolulu Star-Bulletin or the Honolulu Advertiser, Mr. Allen? A. Yes.

Mr. Anthony: I'd like to have this folder marked for identification, your Honor.

The Court: Mark it Exhibit 1 for identification, Petitioner's Exhibit No. 1 for identification.

(Received and marked Petitioner's Exhibit 1 for identification.)

Mr. Anthony: I understand that Mr. Ennis may have some objection to some of these items. Possibly we can iron them out, your Honor. That's why I will not endeavor to introduce them at this moment.

Q. Mr. Allen, you recall upon the outbreak of war the blackout restrictions, do you not?

A. Yes, sir.

(Testimony of Riley H. Allen.)

Q. Will you describe briefly what they were, how severe they were? [378]

A. I think they could be described as a total blackout of all civilian lighting not directly connected with such operations as the loading and unloading of vessels. I do not recall whether on the first night after the blitz the harbor itself was lighted for the dispatch of vessels. But for a considerable time thereafter the rest of the city was in darkness except for such areas as were working directly in emergency operations.

Q. There was also a strict curfew imposed, was there not? A. There was.

Q. That you had to be off the street by eight o'clock was it?

A. Eight o'clock, as I recall it.

Q. That situation has gradually been relaxed, has it not? A. Yes, it has.

Q. Can you state briefly what the relaxation has been, do you recall?

A. It has been relaxed in several stages, including the relaxation as to changes, modifications of lighting of vehicles, motor vehicles, and I believe other vehicles; as to lighting of streets, both by areas and by the character of lighting; and also modifications as to the curfew or the time when pedestrians and others without special passes must be off the streets. [379]

Q. At the present time lights are permitted up to ten o'clock, is that not a fact?

A. They are.

(Testimony of Riley H. Allen.)

Q. Mr. Allen, as soon as it was feasible to do so, do you recall that gas masks were distributed to the civilian communities here? A. They were.

Q. And who did that, do you remember, was it the O.C.D.?

A. I believe it was done by the O.C.D. with the cooperation of the military authorities.

Q. And did people actually carry gas masks?

A. They did.

Q. How long did that continue, roughly?

A. I couldn't state in months, but it was a number of months.

Q. Is anybody carrying gas masks now in the City of Honolulu that you know of?

A. I know of one or two who carry them, one member of our staff, an office boy who often appears with his gas mask. I think he's the only one who does to the best of my knowledge.

Q. Is it fair to say that for a year nobody has been carrying gas masks in the civil community?

Mr. Ennis: Objection. I'm sure that Mr. Allen cannot answer that nobody has been carrying gas masks.

Mr. Anthony: Generally.

Mr. Ennis: Oh, generally. One individual can hardly—— [380]

The Court: There is no question but it's a little too broad.

Q. Well, Mr. Allen, can you tell us about when people stopped carrying gas masks around, people generally?

(Testimony of Riley H. Allen.)

A. I think it was in 1943; there was some relaxation of the vigilance of carrying gas masks. I can recall, after the battle of Midway, but——

Q. That was in 1942?

A. That was in June of '42. However, I think that the habit of carrying the mask or the urge to carry it largely passed in '43.

Q. Do you recall in the early days of the war whether or not service personnel carried gas masks and side arms and helmets?

A. As I recall, there was a considerable period during which the men of the Army carried gas masks, but the men of the Navy did not carry them, and I think thereafter both branches of the Service did not carry them.

Q. And for a time is it a fact that you'd see soldiers downtown with their steel helmets on and gas masks in large numbers? A. That is true.

Q. Do you see anything like that today?

A. Occasionally I see a helmet carried at the side. I do not see any masks or any helmets worn except those who are passing through on trucks or otherwise apparently on maneuvers [381] of some sort.

Q. And have you seen any soldiers walking around the city here with gas masks or helmets during the year, we'll say, 1943, except those that you designated as being on maneuvers or passing through?

A. I couldn't state as to that.

Mr. Anthony: That's all.

(Testimony of Riley H. Allen.)

Mr. Ennis: No cross-examination.

Mr. Anthony: Thank you, Mr. Allen.

(Witness excused.)

Mr. Anthony: Will you call Judge Steiner.

HON. HARRY STEINER,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. What is your name?

A. Harry Steiner.

Q. Where were you born? A. Honolulu.

Q. What is your position at the present time?

A. District Magistrate of Honolulu, First District Magistrate.

Q. How old are you? A. Fifty-three.

Q. Were you in the service during the last war?

[382]

A. I was.

Q. What branch of the service?

A. Infantry.

Q. Judge, how long have you been District Magistrate in Honolulu? A. Twenty years.

Q. Twenty years? Where did you go to school?

A. Punahou and Yale University.

Q. Graduate of Yale Law School?

A. Yale Law School and Yale College.

(Testimony of Harry Steiner.)

Q. Does your family live here?

A. That's right.

Q. And your father lives here?

A. He was until the time of his death.

Q. When did your father come here, by the way?

A. In '82.

Q. The Police Court of Honolulu is one of the busiest courts in this Territory, is it not?

A. It is.

Q. At my request, had you compiled statistics of cases tried in the Police Courts of Honolulu?

A. Yes, I have.

Q. Do you have those with you, Judge?

A. I have them summarized.

Q. I see. You have a memorandum of those cases? A. Yes, I have. [383]

Q. Will you please give us the number of cases that have been tried in the District Court since the war?

A. Since the war there have been 69,582 criminal cases, and 2,641 civil. That makes about 72,000 matters. That is all matters. I might state that does not include all the committments to the Territorial Hospial that I left out.

Q. In addition to your duties as a trial court trying civil and criminal cases, you also have certain statutory duties in regard to the insane, do you not?

A. Yes.

Q. Those cases are not included in the statistics?

A. I have left those out.

(Testimony of Harry Steiner.)

Q. The 72,000 just comprises actual civil and criminal cases tried?

A. Yes. I included the forfeitures.

Q. Yes, forefeitures.

A. Yes, that's included.

Q. That's a criminal case?

A. It's a criminal case.

Q. What kind of cases do you try down there, Judge?

A. Misdemeanors on the criminal side, where the punishment may be anywheres up to a thousand dollars or imprisonment up to one year, or imprisonment and fine. In the civil side, jurisdiction up to $500 in practically all cases. And in certain matters which have been going on for the last six months, involving the landlord, no limit; we have original [384] exclusive jurisdiction between landlord and tenant matters.

Q. Judge, have you got those figures broken down by years? A. Yes, I have.

Q. Could you give us the figures by years?

A. In 1942—these are civil matters—in 1942 there were tried 969 civil cases. In 1943, there were 1,240 cases. And the first three months of this year there have been tried 432, which makes a total of 2,641 civil cases. And as to criminal cases, in 1942, 15,011 tried. In 1943, 43,775. And in the first three months of this year, 11,796—total of 69,582 criminal matters.

Q. Now, Judge, you were on the bench at the outbreak of war, were you not? A. I was.

(Testimony of Harry Steiner.)

Q. Just state briefly what happened to your Court down there?

A. Well, Monday morning we cleared the calendar of the cases that were then to be tried, and at eleven o'clock the order came up from the Military Governor that martial law had been declared.

Q. The Monday following the blitz?

A. Yes, at eleven o'clock on the 8th. And from that time on we ceased to function as to all new criminal matters. We were allowed to finish up the pending criminal cases, and we were allowed to continue with civil matters, in most matters [385] except cases involving the armed personnel and employees working on Government projects.

Q. Where did the Provost Court sit?

A. In the District Court. They used the Courthouse, the equipment, and——

Q. The Court and its facilities?

A. Everything. And we sat with the Provost Judges and helped them merely in an advisory capacity.

Q. How long did this advisory business continue?

A. To my recollection up to September of 1942.

Q. Then there was a relaxation?

A. Upon military order; yes, there was a relaxation.

Q. And then, after March 10th, 1943, you resumed complete jurisdiction, did you not?

A. Not complete.

Q. Not complete? A. No.

(Testimony of Harry Steiner.)

Q. Why was it not complete?

A. Well, we haven't taken over matters of blackout.

Q. Oh, yes. There are defense act regulations.

A. And there are certain individuals, like utility employes, who have been frozen by the Military Governor, and we have no jurisdiction over those individuals.

Q. Oh, you mean you don't try offenses involving the violation of military orders? You don't try any of those cases?

A. That's right. And no offenses involving the utility [386] employees on their work.

Q. You mean to say if a fellow that works for the Hawaiian Electric gets in a fight, you don't try that kind of a case?

A. On their job. Certain individuals, for example, the milk employees, the dairymen, we don't try those.

Q. The milkmen?

A. So I understand. We never have any cases like that.

Q. Do you know the basis for that?

A. No. I haven't a copy of that order, of the March order.

Q. Well, we needn't bother now, Judge. While you were down there in your advisory capacity, did you have occasion to see a great many of those Provost Court cases being tried? A. Yes.

Q. Were there any cases that you ever saw down there that were being tried that the District Court

(Testimony of Harry Steiner.)

could not have handled had it been permitted to do so? A. No, I know of none.

Q. Judge Steiner, you have seen a great many of the phases of the life of this community during your 20 years on the bench, have you not, down there in the Police Court? A. Yes, I have.

Q. What have you to say as to the conduct of this community since the outbreak of war up to the present time?

Mr. Ennis: Objection. It is calling for a general conclusion, your Honor. It has no relevancy to the issue here that I can see.

The Court: Overruled. [387]

Mr. Ennis: Exception.

The Witness: May I go ahead?

The Court: Yes.

A. The conduct has been good, I would say, the general characterization has been very good.

Q. Have you ever seen anything that is unusual or extraordinary other than the fact that there are a lot of people here and a lot of business going on?

A. Nothing whatsoever.

Q. How about the character of the cases that come before your Court, are they any different in any degree than those prior to the war?

A. Just about the same.

Q. Well, have you ever noticed any kind of a case down there in the Provost Court which the District Court of Honolulu could not have handled fully and adequately?

(Testimony of Harry Steiner.)

A. No. I know of no cases that we could have not handled.

Q. How many Judges were there at the outbreak of war? A. Three.

Q. Who were they?

A. Judge Griffith Wight, and Judge Leslie P. Scott and myself, with a fourth as temporary in case of absence or disqualification of one of the regular three Judges.

Q. Wight and Scott were both ex-Army officers, too, in the last war like yourself?

A. They are, that's right, that's right. [388]

Q. You were perfectly ready to go ahead and try all the cases that were brought before the Court, were you not? A. That's right.

Q. And you would have done so but for the imposition of military orders? A. Yes.

Mr. Anthony: That's all.

By the Court:

Q. May I ask, who decided what cases should be brought before your Court or before the Provost Court? A. The Military Governor.

Q. As to each case individually or were they general orders?

A. By a general order. And they had down there in the District Court a coordinator, so that any particular case they could have taken the case from the District Court and given it to the military.

Q. Well, this coordinator, then, as I take it, had or exercised supervision over every criminal case that originated, and he routed it either to your

(Testimony of Harry Steiner.)

Court or to the Provost Court, according to his mind? A. That's right.

Q. That's it? And that officer was appointed by whom? A. By the Military Governor.

The Court: All right.

Mr. Anthony: Did you finish, your Honor?

The Court: Yes. [389]

Q. Do you try cases of assault and battery that occur on military reservations in your Court?

A. We do.

Q. You have concurrent jurisdiction with this Court?

A. We have. But that's civilian personnel.

Q. That's what I mean, where the defendant is a civilian. That's all.

Cross-Examination

By Mr. Ennis:

Q. Were there not cases tried before the Provost Courts for violation of military orders which were not violations of the laws of the Territory, of the County or City? A. That is correct.

Q. Then there were cases tried before the Provost Courts which could not be tried by your Court in the sense that the actions were not offenses under the civil laws which you administered?

A. That's right. But, as I remember, to end the action the local Governor's power is so sweeping as to internal security, I could think of no subject that he couldn't have covered by some local law; but they were actually cases that were not covered, that we have no jurisdiction over except local

(Testimony of Harry Steiner.)

laws; we have no jurisdiction over the Military Governor's orders, or Federal.

Q. But there was conduct and actions of civilians which were violations of military orders which were not also violations of any law you administered, or of any regulation which the Governor had, in fact, issued under the "M-Day" Bill, apart from what he might have issued? [390] A. Yes.

Q. There were such cases? A. Yes.

Q. Tried in the Provost Court?

A. That's right.

Mr. Ennis: That's all, Judge. Thank you.

(Witness excused.)

The Court: Do you have another witness at hand?

Mr. Anthony: Yes, I have two short witnesses that I would like to get rid of; they've been hanging around.

HON. ALBERT M. CRISTY,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please?

A. Albert M. Cristy.

Q. What is your present position, Judge?

A. I am Second Judge of the Circuit Court, First Judicial Circuit.

Q. How long have you held that position?

A. Since the latter part of October, 1926.

(Testimony of Albert M. Cristy.)

Q. Where were you born, Judge?

A. Hudson, Ohio, near Akron.

Q. And you went to the public schools and then to Brown University? [391]

A. I went to the grammar school in Cleveland and the high school in Providence, Rhode Island, and Brown University and Harvard Law School.

Q. Have you ever held any other office in the Territory other than Judge?

A. I was Deputy City and County Attorney from 1915 until 1919.

Q. And you are now Judge of the Circuit Court of the First Circuit? A. Yes.

Q. Judge, were you here at the outbreak of the war?

A. What do you mean by the outbreak of—with Japan?

Q. On December 7th?

A. I have been here; I was in town, yes. I have been constantly in the Territory except for one trip in 1930.

Q. You have been here since the outbreak of war, you have been here up to date?

A. Constantly.

Q. Judge, immediately after the outbreak of war, will you state briefly what happened so far as your Court was concerned, for the benefit of this record?

A. Well, the exact details as to dates and times and exactness—but I can say that on the morning

(Testimony of Albert M. Cristy.)

after the so-called blitz the Judges assembled in Court with the Chief Justice and posted a notice of suspension of business until things were organized. Shortly after that, and during that week or the [392] following week, several conferences were had with officers delegated from the Military Governor's office as to the contribution that the Judges of the Court could make toward assisting, and anything that would be necessary in curtailing their activity for a time being until things were settled down, or acting as assistants in any capacity that their judicial qualifications permitted. And suggestions were made as to how the Judges could conduct their business, both as to continuances and as to setting of cases so as to make the least disturbance or necessity for popular gathering around the Courthouse, but carry on the business of the Court. But we got nowhere for quite awhile.

Q. The Courts were initially closed, you recall that, by military order?

A. Well, it was both by military order and by an order of the Chief Justice of the Supreme Court, acting in cooperation with the suggestions of the military.

Q. Judge, what kind of cases do you handle there, or have you handled, briefly?

A. Well, practically everything in the roster of the Court over there.

Q. That's a general Court of record?

A. It is a general Court of record, and at the particular time of the blitz I think that my calendar

(Testimony of Albert M. Cristy.)

was the Probate and Equity calendar. I wouldn't be positive on that, as to recollection, but I think that that was so. But by reason of the illness of one of the Judges, I was taking on most anything that was [393] available.

Q. You have handled criminal cases, civil cases and jury trials?

A. Oh, last year the criminal calendar was in my division, and we have rotated calendars of all the divisions, all work, regularly.

Q. What have you to say as to your observation on the kind of cases that are coming before the Court now as compared with prior to the war, we'll say?

A. The same type of cases, perhaps with an emphasis on sex cases more than usual in number on the criminal side of the Court. And the other division, the usual civil actions, probate, equity, land court.

Q. Judge, is there any reason that you can think of why any criminal case could not be tried in the Courts of this Territory, if they had jurisdiction?

A. Well, on the contrary, the division last year, as I told you, was the criminal division that my division handled, and we were at all times available not only for the usual calendar arrangements but were able and ready and had the time and the personnel to put on any emergency trial that would be needed. I speak of emergency trial, as we have attempted throughout the year to adjust the trials

(Testimony of Albert M. Cristy.)

so that the witnesses engaged in the war effort or being of military personnel or in any way having a reasonable excuse could be met and their attendance adjusted so as to make it as little inconvenient for their attendance as possible; or to advance cases so as to obtain the testimony of [394] people whose activity ought to be considered. In other words, the calendar was such that, although we had a year practically of very little trial from December, 1941, until the fall of 1942, the criminal calendar which I took over in January, 1942, was what we would call normally a heavy calendar in the sense that there had been an accumulation. But even with that accumulation there was at no time any difficulty of a Prosecutor setting a special emergency trial to accommodate witnesses who might need to be elsewhere later on, or might be lost if their testimony weren't taken.

Q. Judge, is there any reason why the Circuit Court should not have conducted its business within a few weeks after the outbreak of war?

A. I know of none.

Q. Is there anything in the community, that of order or disorder in the community, that prevented that in any way?

A. I heard of no disorder or none was called to the Court's attention that would have hindered the Court from conducting any trial either jury or jury waived.

Q. Well, is it fair to say that the activity of

(Testimony of Albert M. Cristy.)

the Circuit Courts was curtailed only by reason of the military order? A. That is all.

Q. And there was no necessity that you knew of that required the curtailment of those activities?

A. On the contrary, I was one of the Judges picked out as the liaison officer, so to speak, of the Court to attempt to [395] find ways and means to activate business in a more normal way.

Q. Judge, you have observed the people of this community over the past two years and before that. What have you to say of the present conduct of this community?

Mr. Ennis: Objectionable; it is too general, your Honor. I don't know what Counsel means by that question.

The Court: Well, it isn't clear to me.

Mr. Anthony: I'll try to make it a little more specific.

Q. What have you to say as to the order or disorder or law-abidingness or unlawfulness or lawlessness of this community at the present time?

A. Well, I have seen nothing but the ordinary conduct on the street and in the places where people congregate that is affected by the restrictions of various sorts that have been necessary restrictions of conduct. But as to orderliness, I have found nothing out of the way in any part of the community that I have contacted.

Q. Do you know any reason for the trial of civilians in military courts for offenses that don't

(Testimony of Albert M. Cristy.)

actually affect the security of the military establishments?

Mr. Ennis: Your Honor, I object on the grounds that the witness is not qualified as one who might possess the reasons why that is necessary. Obviously, the witness has not been qualified as a military expert.

Mr. Anthony: I am excluding the military cases.

The Court: Read that question back. [396]

(The Reporter read the last question.)

Mr. Anthony: On crimes against the laws of war.

The Court: Overruled.

Mr. Ennis: Exception.

A. Well, we are—including myself and the other Judges that are over there—in the business of sitting as Judges of trials of civilians that are charged with offenses against the general laws, and I see no—I had contact with no reason why we shouldn't be able to function in this community on those kind of cases. And I will add this, that in the conference with the military, taken shortly after the blitz, it was pointed out by me personally to the officer who was in conference that all of the Judges were ready and willing at any intimation from the military establishment that any phase of a case that might come before our Courts that needed to be delayed, or for any other reason had a military aspect to it, that we would be ready and willing and alert to grant continuance, postponement, and investigations of those things, so that there would

(Testimony of Albert M. Cristy.)

be no hampering in any way from the Courts of the Territory, that we presided over anything affecting the military necessities, if that is an answer to your question.

Q. Judge, do you entertain a layman's view on whether or not we are in imminent danger of invasion.

A. I have been trying to find out what they mean by invasion. As a lawyer rather than a layman, the question of invasion doesn't include in my dictionary a sporadic attack or a threat of attack or a desire to attack. [397]

Mr. Ennis: I object to that. The Judge is not qualified to testify as to what American law is. I think no witness is.

The Court: Not qualified as to what?

Mr. Ennis: To testify on the question of American law.

Mr. Anthony: He's talking about the dictionary.

Mr. Ennis: The Judge is answering a question as to what he thinks as a lawyer. Now, I think what American law is, distinguished from foreign law, is a question for us to argue on, not for us to take testimony on.

Mr. Anthony: I don't propose to take testimony on that.

The Witness: I was trying to clarify it. I haven't completed the answer, Mr. Ennis. I'm trying to clarify the background as to how to answer Mr. Anthony's question as a layman on the threat of invasion. I had nothing come to my attention

(Testimony of Albert M. Cristy.)

ever since I've been here, and particularly since the blitz, to indicate that there has been anything that comes within the category of an invasion. But there have been, undoubtedly, for awhile threats of raids. Just how far the planes can fly now for raids from any bases, I am not militarily informed on.

Mr. Ennis: Your statement is as a layman, not as one militarily informed?

The Witness: As a layman who keeps pretty closely in touch with what the military inform me on in their communiques, which I take on their face value until shown the contrary.

Mr. Anthony: That is all. [398]

Cross Examination

By Mr. Ennis:

Q. Judge, I understood you to say that you personally knew of no necessity why civilian offenses should not be tried in your Court?

A. There has been nothing hindering it, from our angle, no, sir.

Q. Now, you are not acquainted, I take it, with the military information or the information in the hands of the military authorities here on any enemy activities, either present or potential, in this Territory?

A. Well, that goes without saying that the military have not taken me into their confidence or shown me their secret files. But I was speaking in my answer about offenses being charged against civilians violating civilian laws. There has been

(Testimony of Albert M. Cristy.)

nothing in the way of trying those cases in any court that I have had contact with, and I have had contact with all the Circuit Courts in this particular city, and with the Judges of the District Court, during the full two years.

Q. Your Court does not have jurisdiction to try offenses by civilians in the form of breaches of military orders, is that correct?

A. Well, the question there comes in, as I understand it, as I understand the law, Mr. Ennis, that those matters should be before the Federal Court and not before the Territorial Court.

Q. But your Court does not have jurisdiction to try those [399] offenses by civilians?

A. That is a matter of law, correct. Our Court would handle only the offenses against the Territorial laws committed any place within the Territory, by an agreement between military and the Courts and the prosecuting officials ever since 1915, since I have been here. Military personnel violating those laws have been turned over to the military for trial, but civilians have been tried in the civilian courts. But as to violating regulations of the military orders by civilians, my understanding of the law is—and I am here to be corrected, or any time—that those are matters before the Federal Court unless they have been taken away by some other method of usurpation.

Mr. Ennis: That is all, Judge Cristy. Thank you.

Mr. Anthony: That is all. Thank you very much.

(Witness excused.)

Mr. Anthony: I have some documentary proof that I'd like to present. I don't know how long your Honor wants to go on. I am perfectly willing to go ahead.

The Court: The time has arrived for a recess, but if you have some particular things that you want to put in, why submit them.

Mr. Anthony: I think I'd like to submit that at the next hearing.

The Court: All right. The Court is adjourned until nine o'clock tomorrow morning as to this case.

(The hearing adjourned at 12:38 o'clock p.m.) [400]

Honolulu, T. H.
April 6, 1944
9:06 o'clock, a.m.

(The hearing was continued.)

The Clerk: Habeas Corpus Docket No. 298, in the matter of the application of Lloyd C. Duncan for a Writ of Habeas Corpus, called for further hearing.

Mr. Anthony: May we proceed, your Honor?

The Court: Yes.

Mr. Anthony: At this time, if the Court please, I'd like to offer in evidence a series of communiques that have been issued by C. W. Nimitz, Admiral, U. S. Navy, Commander-in-Chief U. S. Pacific Fleet and ocean areas, covering the period June 4, 1942, to and including March 30, 1944. I have

the assurance of Counsel for the Government that these are all of the communiques that have been issued by either the Army or Navy out of this area during the period. (Handing the Court a series of mimeographed pages.)

The Court: Received in evidence as Exhibit "B", is it?

The Clerk: "A". It only has been marked.

The Court: How many of them are there? They are bound?

Mr. Anthony: They are bound, your Honor.

The Court: Petitioner's Exhibit "A". That's the first exhibit, is it not?

Mr. Anthony: At this time, if the Court please, I should like to offer in evidence——

The Court: May I ask first, are these dated, each one of them? [401]

Mr. Anthony: I believe they are, your Honor.

The Court: Well, are they presented here in their chronological order?

Mr. Anthony: I presume that is correct. I did not prepare the exhibit. Counsel had it prepared by his principals.

Mr. Ennis: I believe, your Honor, that each set of communiques bears numbers in order.

Mr. Anthony: And they are in chronological order.

The Court: The first one is numbered "41."

Mr. Ennis: Yes. As your Honor has them before you, they are in inverse order.

Mr. Anthony: In other words, the battle of Midway will be the last one on that file.

The Court: No, no, we are out to Palau Island now.

Mr. Anthony: Yes, your Honor.

(Petitioner's Exhibit "A" was received in evidence.)

PETITIONER'S EXHIBIT A

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 41

(For release at
1700 (HWT), Thursday,
30 March 1944).

Strong Pacific Fleet Forces, at dawn Wednesday, 29 March, (West Longitude Date), initiated heavy attacks on the Japanese-held Palau Islands. After discovery of approach of our forces by enemy planes searching from their bases in the Carolines and New Guinea their ships were observed fleeing the area before our units could reach attack positions. Our attacks continue. No further details are as yet available.

C. W. NIMITZ,
Admiral, U. S. Navy,
Commander in Chief, U. S.
Pacific Fleet and Pacific
Ocean Areas.

Petitioner's Exhibit A—(Continued)

Background Information for the Press

Palau Islands are a group of 200 small, heavily wooded, volcanic islands at the Western end of the Caroline chain. Babelthuap Island, the largest in the Palau group, is 142 square miles in area, the second largest land mass in the Carolines and exceeded in size only by Ponape.

The town of Koror, just south of Babelthuap Island is the seat of Japanese administration of the 1500 Caroline Islands which, for administrative purposes, are divided into four districts—Palau, Yap, Truk and Ponape.

The Spanish explorer Magellan came into the South Pacific in 1521, stopping at Guam and the Philippines, but the Palau group was not discovered until 1712 when a band of Spanish missionaries landed on one of the islands. The group was "rediscovered" in 1783 by an Englishman, Capt. Wilson, whose ship the Antelope belonged to the East India Company.

Spain held loose control over the Palau Islands until 1898 when, at the end of the Spanish-American war, Spain sold the Carolines and the Marshalls to Germany. In 1914, however, when Japan joined the Allies to fight Germany, Japan moved in and took over. At the end of the first World War, she was given a Class "C" mandate over the islands.

The natives of the Palau group are Micronesians who are smaller and darker than Polynesians. In 1937 there were 6587 natives, 9530 Japanese and 18 foreigners registered in the Palau Islands. Before

Petitioner's Exhibit A—(Continued)

the war there were two Christian schools in Palau.

Palau Islands lie within one of the rainiest areas of the Pacific, the average total rainfall being some 180 inches per year. Destructive typhoons often hit these islands, flattening houses and uprooting trees. Many installations in the Palau group were destroyed by a great typhoon in 1937.

—2—Palau Background Material

Pigs, cows and chickens were imported by the Spaniards and are raised for food. Taro, sweet potatoes, rice, bananas and papayas round out the native diet. There are no poisonous snakes and the islands are free from the malaria-carrying mosquito.

The principal crop is coconuts and much copra is exported each year. Fishing is also important and tunny-fish and bonita are dried and shipped to Japan for food. Many tortoise shell objects are made by the natives.

The Palau islands are well-known as the home of the Mikimoto culture pearls. Grains of sand are inserted within the shells of young oysters and at the end of nine ~~years, the~~ oysters are opened and the full-grown pearls removed. Before the war, Mikimoto culture pearls were ~~sold~~ in the finest shops of New York, Paris and London.

The island of Anguar, lying to the south, is one of the most important islands commercially. Eight square miles in area, it is one huge phosphate mine whose contents are shipped to Japan for fertilizer and munitions-making. In 1934 some 60,000 tons were shipped to Japan and it is estimated that

Petitioner's Exhibit A—(Continued)

2,400,000 tons comprise the deposit. In pre-war days, Japan obtained one-fifth of her entire consumption from this island.

In the Palau group, as well as the Caroline and Mariana Islands are traces of earthworks, walls and canals which were apparently built by ancient people of superior intelligence and organizing ability. The secret of these ruins has never been solved.

—

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 40

(For Release at 1200 (HWT),
Wednesday, 23 February 1944)

1. The conquest of Eniwetok Atoll was completed on the evening of 22 February (West Longitude Date) with the capture of Parry Island.

The enemy garrison which defended the atoll is estimated at 3,000.

2. A strong Pacific Fleet task force, including several hundred carrier-based aircraft, struck Saipan and Tinian Islands in the Mariana group, on 22 February (West Longitude Date). Further details are not now available.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 39

(For release at 1730 (HWT),
Monday, 21 February 1944).

Our forces have captured Eniwetok Island. Enemy resistance has been stubborn, and small pockets of troops are yet to be overcome.

Parry Island is being heavily attacked by our air and surface forces.

Preliminary reports indicate that our overall casualties in the capture of the Eniwetok Atoll as of last night are approximately 150 dead and 350 wounded.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

—

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 38

(For release at 1930 (HWT),
Sunday, 20 February 1944).

Our forces have landed on Eniwetok Island and now have possession of the western half of the island. The attack is being carried out by elements

Petitioner's Exhibit A—(Continued)

of the 106th Infantry supplemented by a unit of the 22nd Marines.

Except for Parry Island, the remainder of the atoll is in our hands.

Casualties continue to be light.

C. W. NIMITZ,
Admiral, U. S. Navy,
Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

—

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 37

(For release at 1200 (HWT), Sunday, 20 February 1944).

The Pacific Fleet has returned at Truk the visit made by the Japanese Fleet at Pearl Harbor on 7 December 1941, and effected a partial settlement of the debt. The initial approach was undetected.

During attacks on 16 and 17 February (West Longitude Date) our carrier planes destroyed at least 201 enemy aircraft, 127 of which were shot down in combat. More than fifty additional enemy aircraft were damaged on the ground. There was no enemy air opposition on the second day of the attack.

Enemy surface ships sunk included two light cruisers, three destroyers, one ammunition ship, one

Petitioner's Exhibit A—(Continued)

seaplane tender, two oilers, two gunboats, and eight cargo ships. Additional enemy ships probably sunk included one cruiser or large destroyer, two oilers, and four cargo ships.

Shore facilities on the principal islands, including airdrome runways and installations, were thoroughly bombed and strafed.

Our losses were 17 planes. None of our ships was lost, but one sustained moderate damage.

Admiral R. A. Spruance, U. S. Navy, was in overall command of the operation, and Rear Admiral Marc A. Mitscher, U. S. Navy, former Commanding Officer of the Hornet, directed the carrier air attack.

C. W. NIMITZ,
Admiral, U. S. Navy,
Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

—

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 36

(For Release at 1300 (HWT), Saturday, 19 February 1944)

Our forces have captured the enemy air base at Engebi and several other islands in the northern portion of the Eniwetok Atoll. Preliminary reports indicate our casualties have been light.

Petitioner's Exhibit A—(Continued)

Assaults on other portions of the atoll are proceeding according to schedule.

C. W. NIMITZ,
Admiral, U. S. Navy,
Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 35

(For release at
1230 (HWT).

The capture of Eniwetok Atoll has been undertaken by forces of the Pacific Ocean Areas. Army and Marine assault troops have landed and established beachheads.

The initial landings took place after strong preliminary attacks by carrier-based aircraft and by heavy ships of the Pacific Fleet. The troops went ashore under the cover of battleship gunfire and with the close support of low flying naval aircraft.

All forces participating are under the immediate command of Rear Admiral R. K. Turner. The amphibious forces are commanded by Rear Admiral H. W. Hill. The assault troops comprising the Twenty-second Marines and elements of the

Petitioner's Exhibit A—(Continued)

106th Army Infantry are commanded by Brigadier Gen. T. E. Watson, USMC.

C. W. NIMITZ,
Admiral U. S. Pacific Fleet,
and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 34

(For Release at 1100 (HWT),
Thursday, 17 February 1944)

At daylight yesterday morning, 16 February (West Longitude Date), powerful naval task forces of the U. S. Pacific Fleet commenced an attack on the Japanese Naval Base at Truk with several hundred of our planes participating. No further details available.

C. W. NIMITZ,
Admiral, U. S. Navy,
Commander in Chief, U. S.
Pacific Fleet and Pacific
Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 32

(For Release at 1230 (HWT),
Sunday, 6 February 1944)

Occupation of the Kwajalein Atoll is nearly complete.

Gugegwe, Bigej, and Eller Islands have been captured after moderate resistance, and several additional undefended islands occupied.

C. W. NIMITZ,
Admiral, U. S. Navy,
Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 33

(For Release at 1230 (HWT),
Tuesday, 8 February 1944)

Organized resistance on Kwajalein Atoll has ceased, and its capture and occupation have been completed.

C. W. NIMITZ,
Admiral, U. S. Navy,
Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 29

For release at 1130 (HWT),
Thursday, 3 February 1944).

Our forces have captured Namur and several adjacent islands.

Resistance continues on Kwajalein Island, but we have landed troops and mechanized equipment in force and are proceeding with the annihilation of the enemy.

C. W. NIMITZ,
Admiral, U. S. Navy
Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 30

(For release at 1730 (HWT),
Friday, 4 February 1944).

Operations at the Kwajalein Atoll continue satisfactorily.

Our forces have landed on Ebeye, north of Kwajalein Island. The landing was unopposed but resistance was encountered a short distance inland

Petitioner's Exhibit A—(Continued)

from the beach. We have now occupied half the island.

Two small islands between Kwajalein and Ebeye have been occupied following neutralization of moderate opposition. Gugegwe and Loi Islands, north of Ebeye have been taken under attack by bombing and Naval gunfire, and the enemy is answering our fire.

Resistance on Kwajalein Island continues, but progress is being made. Our casualties continue to be moderate.

C. W. NIMITZ,
Admiral, U. S. Navy,
Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 27

(For Release at 1000 (HWT),
Tuesday, 1 February 1944)

Powerful forces of all types, commanded by Vice Admiral R. A. Spruance, U. S. Navy, have begun operations the objective of which is the capture of the Marshall Islands.

Following intensive preparatory bombardment of enemy installations by carrier-based aircraft and by battleships and light surface units, Army and Ma-

Petitioner's Exhibit A—(Continued)

rine assault forces have initially established beachheads on islands in the vicinity of Roi and Kwajalein Islands, in the Kwajalein Atoll. Installations on Wotje and Maloelap Atolls were heavily-bombarded by carrier aircraft and by surface forces.

All amphibious operations are commanded by Rear Admiral R. K. Turner, U. S. Navy. The assault troops are directed by Major General H. M. Smith, U.S.M.C. The landing attacks in the Roi Island area are being made by troops of the Fourth Marine Division, commanded by Major General Harry Schmidt, U.S.M.C. The landings are being effected in the Kwajalein Island area by troops of the Seventh Infantry Division, commanded by Major General Charles H. Corlett, U. S. Army.

Strong opposition is being encountered in both assault areas. Initial information indicates that our casualties are moderate.

Supporting air attacks are being made at Kwajalein, Maloelap, Wotje, Mille, Jaluit, Eniwetok and Wake by carrier task forces commanded by Rear Admiral M. H. Mitscher, U. S. Navy, by units of the Seventh Army Air Force, commanded by Major General Willis H. Hale, U. S. Army, and by units of Fleet Air Wing TWO commanded by Rear Admiral John D. Price, U. S. Navy. All shore based aircraft in the Gilberts are operating under the direction of Commander Aircraft, Central Pa-

Petitioner's Exhibit A—(Continued)

cific Force, Rear Admiral John H. Hoover, U. S. Navy.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 26

(For release at 1900 (HWT), Sunday, 30 January 1944).

Our carrier task forces today continued their attacks on Kwajalein, Roi, Maloelap and Wotje.

During the day surface forces bombarded the same objectives while carriers extended their operations to include bombing of Eniwetok.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 31

(For Release at 1100 (HWT)
Saturday, 5 February 1944)

Kwajalein, Ebeye, and Loi Islands have been captured by our forces.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 28

(For release at 1100 (HWT),
Wednesday, 2 February 1944).

Our forces have captured Roi Island.

Landings have been made on Kwajalein and Namur Islands and the action is progressing favorably. On Namur the enemy has been contained in the extreme northern portion of the island, and at Kwajalein our troops are firmly established and are pushing the enemy back.

Continuous bombardments of beaches by our warships, planes, and landbased artillery enabled

Petitioner's Exhibit A—(Continued)

our forces to make landings on the three principal objectives with little resistance.

We have suffered no Naval losses and casualties are very moderate. It is now apparent that the attack took the enemy completely by surprise.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 24

(For Release at 1330 (HWT), Thursday, 9 December 1943)

Strong forces of the Pacific Fleet attacked Nauru Island with carrier aircraft and ship bombardment on 8 December (West Longitude Date). Further details are not now available.

Liberators of the 7th AAF which raided the Taroa airdrome installations on the morning of 7 December were intercepted over Maloelap by eight enemy fighters. One fighter was shot down. Our

Petitioner's Exhibit A—(Continued)

planes suffered only slight damage. A Liberator of this force also bombed Mille during the same sortie.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 25

(For release at 1600 (HWT), Saturday, 29 January 1944).

Pacific Fleet carrier task forces have made attacks on Marshall Island bases today, including Taroa, Wotje, and Kwajalein.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 20

(For release at 1130 (HWT),
Wednesday, 24 November 1943).

Betio island, Tarawa atoll, was captured shortly after noon 23 November, (West longitude date), following a desperate enemy counter-attack which was crushed by troops of the Second Marine Division. Remnants of the enemy are being hunted down on Apamama, Tarawa and Makin atolls. Seventh AAF Liberators continued diversionary attacks in the Marshalls.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 23

(For Release at 1030 (HWT),
Wednesday, 8 December 1943)

Our carrier task forces which attacked enemy installations on Kwajalein and Wotje atolls on 4 December (West Longitude Date) destroyed 72 planes in the air, strafed and burned an undetermined number of medium bombers on the ground; and destroyed or damaged various ground installations on Kwajalein, Ebeye, Roi and Wotje islands.

At Kwajalein they sank two light cruisers, one

Petitioner's Exhibit A—(Continued)

oiler and three cargo transports, and damaged one troop transport and two cargo transports. At Wotje, one cargo transport was damaged.

Our forces, under command of Rear Admiral Charles A. Pownall, successfully fought off vigorous, prolonged aerial and torpedo and bombing attacks. Of one group of seven torpedo planes, six were destroyed by anti-aircraft fire.

One of our ships suffered minor damage. Our aircraft losses were light.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 22

(~~For~~ release at 00 (HWT), December 1943).

Strong carrier task forces attacked the Marshall Islands on 4 December (West longitude date). Due to the necessity for radio silence details are not yet available.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 18

(For Release at 1330 (HWT),
Monday, 22 November 1943)

Our troops have improved their positions on Tarawa and Makin atolls, but are still encountering considerable enemy ground resistance. We have landed on Apamama atoll. Liberators heavily bombed the airdrome area at Nauru Island on 20 November (West Longitude Date) and on 21 November Army Liberators continued diversionary attacks in the Marshalls.

The central Pacific operations are being directed by Vice Admiral Raymond A. Spruance, U. S. Navy. The amphibious forces are under command of Rear Admiral Richmond K. Turner, U. S. Navy.

Landings were made on Tarawa by the Second Marine Division in command of Major General Julian C. Smith, USMC; those on Makin by troops of the 27th Infantry Division, commanded by Major General Ralph Smith, USA. Major General Holland McT. Smith, USMC, is in command of the landing forces.

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Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 19

(For release at 11:30 (HWT),
Tuesday, 23 November 1943).

Our forces have captured Makin. On Tarawa, the Marines have consolidated their positions and are making good progress against enemy concentrations on eastern end of Betio island, with capture assured. The situation on Apamama is well in hand.

Raids are being continued against the Marshalls by carrier aircraft and Army Seventh Air Force Liberators.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 8.

21 August 1942.

Since the initial successful landings in the Solomon Islands by U.S. Forces under the command of Vice Admiral Ghormley, a period of mopping up in order to consolidate our positions has been in progress. Japanese defenders took to the hills and jungle to escape from our forces. There have been daily skirmishes between U.S. Marine patrols and enemy detachments. In these actions both sides have suffered casualties.

Petitioner's Exhibit A—(Continued)

On August 19th the Marines with a loss of 6 killed and 13 wounded wiped out a Japanese detachment of 92 officers and men. Enemy resistance continued until the last man was killed.

On the night of August 20th the enemy landed a force of about 700 well equipped troops from high-speed boats outside of the Marines' lines, and attempted to break through. During darkness only hand to hand fighting was possible but with the breaking of day the Marines were able to maneuver. While one battalion held the front line another battalion moved to the flank and drove the then withdrawing Japanese to the beach. Action continued until late afternoon. Of the 700 Japanese, 670 are dead, the rest prisoners. Marine losses were 28 killed and 72 wounded.

The Marines in the Solomons, who are under the command of Major General Alexander A. Vandegrift, U. S. Marine Corps, have added another page to their history of outstanding achievement.

/s/ C. W. NIMITZ,
Commander in Chief, Pacific
Fleet and Pacific Ocean
Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 17

(For Release at
1100 (HWT), Sunday,
21 November 1943).

Army and Marine Corps forces, covered by powerful units of all types of the Pacific Fleet, have established beach heads on Makin and Tarawa atolls, Gilbert Islands; meeting moderate resistance at Makin and strong resistance at Tarawa. Fighting continues. During these operations Army Liberators made diversionary attacks in the Marshalls.

C. W. NIMITZ,
Admiral U.S. Pacific Fleet,
and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 16

(For release at
1200 (HWT), Wednesday,
17 November 1943.)

Late afternoon raids were made on enemy positions on Jaluit and Mille atolls, in the Marshall Islands and on Makin Island, in the Gilberts, on 15 November, West Longitude date, by Liberator bombers of the Army's Seventh Air Force.

Petitioner's Exhibit A—(Continued)

At Jaluit, many fires were started by our bombs in the hangars, shops and dump areas at the seaplane bases on Imieji and Jabor Islands. Of the five ships anchored in the lagoon; one was left burning, three others were possibly damaged.

Several fires resulted from the Mille attack, but cloud conditions prevented accurate observance of damage at Makin.

No air interception was encountered in any instance. Anti-aircraft fire was intense at Mille, weak at Makin and at Jaluit. No damage was suffered by our planes or personnel.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 15

(For Release at 2330 (GCT),
10 October 1943)

Supplementing Pacific Ocean Areas Communique No. 14, the following information is available concerning our operations against Wake Island:

The initial heavy and protracted attack made by carrier aircraft and ship bombardment, beginning at dawn on 5 October, West Longitude Date, was followed late the same afternoon by an attack by a group of Navy Liberator bombers led by Commander John T. Hayward, U. S. Navy, and on the morning of 6 October by a further carrier aircraft

Petitioner's Exhibit A—(Continued)

bombing by the force commanded by Rear Admiral Alfred E. Montgomery, U. S. Navy.

In the extended attacks our planes dropped 320 tons of bombs. An intensive bombardment by the ships combined to inflict considerable damage to enemy installations on Wake, Peale and Wilkes Islands. Enemy defenses were so neutralized in the initial bombardment that the heavy bombers encountered only weak and ineffective anti-aircraft fire and no air opposition in their low altitude bombing attack in the late afternoon of 5 October.

Our forces destroyed 30 or more enemy planes in the air and 31 on the ground. Many fires were started in the plane dispersal areas, shops, barracks, and storage areas throughout the three Islands. Two small vessels, one loaded with gasoline, were destroyed.

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 15 (Continued)

Damage by enemy action to our ships and ship's personnel was negligible. We lost 13 planes in combat.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief Pacific Fleet and Pacific Ocean Areas

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 14

For Release after
1200 (HWT) 6 October 1943.

A strong Pacific Fleet task force, commanded by Rear Admiral Alfred E. Montgomery, U S N, heavily attacked enemy held positions on Wake Island with carrier aircraft and ship bombardment commencing at dawn on 5 October 1943, West Longitude Date. Further details are not now available.

/s/ C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 13

22 September 1943

Supplementing Pacific Ocean Areas Communique No. 12, the following information concerning our operations against enemy installations in the Gilbert Islands region during the night preceding and throughout the day of 19 September, East Longitude Date, is available:

Petitioner's Exhibit A—(Continued)

Attacks were made by carrier-based aircraft and by land-based Army and Navy aircraft from various bases in the Central and South Pacific areas.

More than 200 sorties were carried out by our planes against Tarawa, Makin and Apamama Islands, in the Northern Gilberts, and Nauru Island, west of the Gilbert group.

Damage to the enemy included: At Tarawa: Airdrome facilities heavily damaged, eight bombers destroyed on the runway, one small vessel sunk; at Makin; airbase damaged, three four-engine seaplanes and one other patrol plane destroyed; at Apamama: Enemy camp installations heavily hit; at Nauru: Damage to installations.

In addition to destroying aircraft on the ground, our forces shot down six Zeros, probably destroyed four others and damaged eight more fighters, and shot down two medium bombers.

Despite attempted interception by day and night fighters and intense anti-aircraft fire encountered, our losses totalled only four planes.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, Pacific Fleet and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 12

For Release after 2200 (HWT)
18 September, 1943.

Strong Pacific Ocean Area forces today conducted heavy raids on the Japanese bases at Tarawa Island, in the northern Gilbert group, and on Nauru Island, west of the Gilbert group.

These operations were carried out according to plan during the night preceding and for a good portion of the day of 19 September, East Longitude Time.

Details of the operations are not immediately available.

/s/ C. W. NIMITZ,
Admiral, U.S. Navy, Commander in Chief, Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 11

8 September, 1943.

A task force commanded by Rear Admiral Charles A. Pownall, U.S. Navy, attacked Marcus Island

Petitioner's Exhibit A—(Continued)

at dawn on 1 September, 1943, East Longitude Time. The first wave of the attack apparently caught the enemy completely by surprise. It is estimated that the attack, made in several waves throughout the day, destroyed 80 per cent of military installations on the island. Our losses totalled two fighters and one torpedo plane.

Some anti-aircraft fire was encountered by the initial wave, but was eliminated by succeeding attacks. Fires started throughout the island were still burning the day following the attack.

No enemy planes left the ground. Seven twin-motored bombers which were parked on the runway were destroyed by our fighters. Installations destroyed included hangars, fuel and ammunition storage, shops, and living quarters. The two landing strips were severely damaged by heavy bombs. A small tanker caught near the island was sunk by our bombers.

C. W. NIMITZ,
Admiral U.S. Navy, Commander in Chief, Pacific Fleet and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 10

November 16, 1942

By far the strongest Japanese attempt to date to recapture Guadalcanal has been completely frustrated by the aggressive action of Fice Admiral W. F. Halsey and his forces in the South Pacific Area.

The enemy transport force was almost annihilated, so that little if any assistance, reached the Japanese land forces on Guadalcanal. Major General A. A. Vandegrift, U.S.M.C. with his Army, Navy and Marine Corps forces continue to have the situation well in hand.

The strong escorting and bombardment forces of the enemy, comprising a large portion of his fleet, were attacked by our surface forces in two heavy night engagements in the vicinity of Guadalcanal. They were also severely damaged by our aircraft, submarines and motor torpedo boats.

As a result all enemy forces were either destroyed or driven back and a major victory was obtained by our gallant forces.

Reports of own and enemy losses have been announced by the Navy Department.

C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, Pacific Fleet and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States Pacific Fleet and
Pacific Ocean Areas
Communique No. 9

15 September 1942.

This afternoon our Army Air Forces in Alaska delivered a most successful attack on enemy shipping and shore installations at Kiska.

Enemy ships and planes in the harbor received direct bomb hits and repeated strafing. At least two naval vessels were sunk. Five enemy fighting planes were shot down in flames and one 4-engine patrol plane was burned on the water.

Installations and storage dumps around the harbor were repeatedly bombed and strafed, resulting in large fires and explosions.

Enemy personnel casualties are estimated at around 500 whereas we lost two pilots as a result of two P-38's colliding in midair.

C. W. NIMITZ,
Admiral, U.S. Navy, Commander in Chief, U.S. Pacific Fleet and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 21

(For Release after 1100 (HWT)
Wednesday, 1 December 1943)

Preliminary reports of the Gilbert operations indicate that our landing forces suffered the following approximate casualties:

At Tarawa:
Killed in action.....1,026
Wounded in action.....2,557

At Makin:
Killed in action..... 65
Wounded in action..... 121

At Apamama:
Killed in action..... 1
Wounded in action..... 2

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United States Pacific Fleet and
Pacific Ocean Areas
Communique No. 7

21 August 1942.

A force of Marines of the U. S. Pacific Fleet made a successful landing on Japanese held Makin Island on August 17th. The purpose of the expedition was to destroy the installations of this enemy

Petitioner's Exhibit A—(Continued)

seaplane base. This purpose was accomplished in its entirety and the force has been withdrawn.

Known enemy losses inflicted by the Marines are: at least eighty Japanese killed; radio installation and stores destroyed; one large and one small seaplane destroyed on the water. Other losses were inflicted on the enemy forces by heavy bombing attacks of their own aircraft from other bases, which were attempting to assist them.

The ships of our expedition gunned and sank one small transport and one gunboat.

Considering the nature of this operation, our forces suffered only moderate losses.

The Naval Officer commanding the expedition was Commander John M. Haines, U. S. Navy. The Marines were commanded by Lieutenant Colonel Evans F. Carlson, U. S. Marine Corps Reserve. Second in command of the Marines was Major James Roosevelt, U. S. Marine Corps Reserve. None of these officers was on the casualty list.

/s/ C. W. NIMITZ,
Admiral, U. S. Navy, Commander in Chief, U.S. Pacific Fleet, and Pacific Ocean Areas.

Petitioner's Exhibit A—(Continued)

United States
Pacific Fleet and
Pacific Ocean Areas
Communique Number 6

August 8, 1942.

Forces of the United States Pacific Fleet and Pacific Ocean Areas, assisted by units of the Southwest Pacific Area, launched offensive operations in the Tulagi area of the Solomon Islands on August 7th, East Longitude date. These operations are progressing favorably in spite of opposition by enemy land based aircraft and garrisons.

On August 8th, East Longitude date, a task force of the Pacific Fleet bombarded enemy ships and installations in Kiska harbor.

/s/ C. W. NIMITZ,
Admiral, U. S. Navy, Commander-in-Chief, U.S. Pacific Fleet and Pacific Ocean Areas.

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Communique Number 5 Was Never Released By the Commander in Chief, Pacific Fleet

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique Number 4.

June 7, 1942.

The enemy appears to be withdrawing. Contact

Petitioner's Exhibit A—(Continued)

was lost during last night. Additional damage was inflicted on two enemy cruisers. Until all reports can be checked, it is impossible to state whether these cruisers are in addition to those reported in Communique #3, or whether they were damaged cruisers included in the previous report. One enemy destroyer was sunk.

One United States destroyer was sunk by a submarine but nearby ships rescued the personnel with small loss of life.

Except for minor submarine activity in the vicinity of the Hawaiian Island Chain, this Section of the Pacific is quiet.

/s/ C. W. NIMITZ
Commander in Chief, U. S. Pacific Fleet, and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 3

6 June 1942

Though the skill and devotion to duty of their armed forces of all branches in the Midway area our citizens can now rejoice that a momentous victory is in the making.

It was on a Sundey just six months ago that the Japanese made their peacetime attack on our fleet

Petitioner's Exhibit A—(Continued)

and army activities on Oahu. At that time they created heavy damage, it is true, but their act aroused the grim determination of our citizenry to avenge such treachery, and it raised, not lowered, the morale of our fighting men.

Pearl Harbor has now been partially avenged. Vengeance will not be complete until Japanese sea power has been reduced to impotence. We have made substantial progress in that direction. Perhaps we will be forgiven if we claim we are about midway to our objective!

The battle is not over. All returns have not yet been received. It is with full confidence, however, that for this phase of the action the following enemy losses are claimed; two or three carriers, and all their aircraft, destroyed; in addition one or two carriers badly damaged and most of their aircraft lost; three battleships damaged, at least one badly; four cruisers damaged, two heavily; three transports damaged. It is possible that some of these wounded ships will not be able to reach their bases.

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 3 (Continued)

One of our carriers was hit and some planes were lost. Our personnel casualties were light.

This is the balance sheet that the Army, Navy

Petitioner's Exhibit A—(Continued)

and Marine forces in this area offer their country this morning.

C. W. NIMITZ,
Commander-in-Chief, U.S. Pacific Fleet and Pacific Ocean Areas.

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United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 2

June 5, 1942

The Japanese have not followed up their initial air attack on Midway except by a few ineffectual shots from a submarine last night. As more reports come in it appears that the enemy's damage is very heavy indeed, involving several ships in each of the carrier, battleship, cruiser and transport classes. This damage is far out of proportion to that which we have received.

The brunt of the defense to date has fallen upon our aviation personnel in which the Army, Navy and Marine Corps are all represented. They have added another shining page to their record of achievements.

One carrier already damaged by air attack was hit by three torpedoes fired by a submarine.

On every occasion when we have met the enemy our officers and men have been superlative in their

Petitioner's Exhibit A—(Continued)

offensive spirit and complete lack of fear. Our country can feel secure with such personnel such as this.

There were reported several instances of the enemy planes machine gunning our aviation personnel who had bailed out in parachutes or were adrift in rubber boats.

While too early to claim a major Japanese disaster it may be conservatively stated that the United States' control remains firm in the Midway area.

United States
Pacific Fleet and
Pacific Ocean Areas
Communique No. 2. (Continued)

The enemy appears to be withdrawing but we are continuing the battle.

C. W. NIMITZ,
Commander - in - Chief, U. S. Pacific Fleet and Pacific Ocean Areas.

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4 June, 1942.

U. S. Pacific Fleet Communique No. 1.

At 6:35 a.m., Today Midway time, that island was heavily raided by Japanese carrier based planes. The attack was repulsed by the local defenders in which all the armed services are represented. A heavy toll of the attacking planes was taken. Damage to material installations at Midway was reported

Petitioner's Exhibit A—(Continued)

as minor. No report of personnel casualties has been received.

The Japanese carriers were accompanied by battleships, cruisers, and destroyers. One battleship and one carrier have been definitely damaged and other vessels are believed to have been hit. Our attacks on the enemy are continuing.

C. W. NIMITZ,
Commander-in-Chief, U. S. Pacific Fleet, and Commander-in-Chief, Pacific Ocean Area.

[Endorsed]: Filed April 5, 1944.

Mr. Anthony: At this time, I'd like to offer in evidence a statement appearing in Volume 65, No. 3346, Army and Navy Register, dated January 22, 1944, containing a quotation from Admiral Halsey.

Mr. Ennis: Counsel, are you just offering Admiral Halsey's quotation or the comments in connection with it?

Mr. Anthony: I am offering the entire statement.

Mr. Ennis: May I have a moment to examine this, your Honor? (Mr. Anthony shows Mr. Ennis a copy of a magazine.)

Mr. Anthony: I might state for your Honor's information that it is my understanding that the Army and Navy Journal and the Army and Navy

Register are in the nature of professional magazines [402] which are recognized by the Military and Naval forces of the United States.

Mr. Ennis: No objection.

Mr. Anthony: I have here a photostatic copy of the article itself, and in it is indicated the portion which I am offering. (Handing a photostat to the Court.)

The Court: Received in evidence as Exhibit "B".

(Petitioner's Exhibit "B" was received in evidence.)

PETITIONER'S EXHIBIT "B"

Library of Hawaii

ARMY AND NAVY REGISTER

ADMIRAL HALSEY'S VIEWS

Admiral Wm. F. Halsey, jr., home on leave from the South Pacific, at the home of his daughter, Mrs. Preston L. Spruance, in Delaware, stated his opinion that the way to win the war was beat Hitler and then get the "stuff" out to the Pacific so we can polish off the Japs. He is quoted as saying:

"While the Japs seem to have enough equipment, the Jap air force has definitely deteriorated—some of their flyers are mere kids, lacking air training and air experience. We have captured some of their 18-year-old pilots. We outclass the Japs in planes and personnel.

"Air power alone is not enough. It takes a fighting man on the ground to help win the fight. You

can't win with ships and planes alone nor with ground troops alone. It's the combination.

"Island hopping is not the best way to win, of which all fighting men are convinced. In a small way we have gone around some of the islands. This has worked out well."

As to unified command, Admiral Halsey said, "Everybody has an area for which he is responsible. My directions come from Gen. MacArthur, and our relations are most cordial. I see him about once every two months, and I never received finer treatment from any man."

With regard to "where is the Jap fleet?" the admiral said that, while units of it "are all over the Pacific," it is concentrated to a certain extent at Truk in the Carolinas and off the mainland of Japan, and added:

"If it came to a show-down fight between their fleet and ours, the American fleet would be afloat and theirs at the bottom of the sea, where all Jap ships should be.

"When you begin to lick a Jap and lick him properly, he may then begin to doubt he is the son of the Sun God. When he is well fed and well uniformed he is tough, like any other rat. But when they are hungry and can't get food they are easy to beat—like other rats."

[Endorsed]: Filed 4-6-44.

Mr. Anthony: And from the same publication, the same issue, if the Court please, I would like to offer a speech of General Arnold before the Poor Richard Club of Philadelphia, on January 17, 1943. (Showing Mr. Ennis a photostat.) The General says in part, if the Court please: (Reading)

> "The aerial spearheads that we have driven into the periphery of the Japanese empire form an air front that has enabled us to get definite superiority over the enemy. These spearheads no longer knock at the extreme outside, but are reaching farther and farther within the circle and now threaten important Jap strongholds like Rabaul, Truk, and Kavieng."

Mr. Ennis: No objection.

(Mr. Anthony hands a photostat to the Court.)

The Court: Received Exhibit "C"

(Petitioner's Exhibit "C" was received in evidence.)

PETITIONER'S EXHIBIT "C"

Library of Hawaii

ARMY AND NAVY REGISTER

FIGHTING THE JAPS

Gen. Henry H. Arnold, Commanding General, Army Air Forces, on January 17 received from the Poor Richard Club of Philadelphia the Gold Medal of Achievement for 1943, awarded annually by the club. The presentation was made at the Bellevue-

Stratford Hotel in Philadelphia during the club's thirty-ninth annual dinner.

In accepting the honor, Gen. Arnold, among other things, said:

"We are fighting, and fighting hard, in theaters other than Europe—for instance, in the Pacific and Asia against the Japs. These operations against the Japanese have not been secondary. The problems, however, are most difficult and have been entirely different. The Europan phase of the conflict is approaching its crisis sooner, and geographical conditions made it possible to close grips with that enemy first.

"In the islands of the Pacific there were no adequate airfields waiting for us such as we were able to use in Great Britain. All military activity in the Pacific must be directed toward securing air strips. This transoceanic war has been a slow, tedious, and difficult job, and, while much has been accomplished, we still have a long way to go. The aerial spearheads that we have driven into the periphery of the Japanese empire form an air front that has enabled us to get definite superiority over the enemy. These spearheads no longer knock at the extreme outside, but are reaching farther and farther within the cricle and now threaten important Jap strongholds like Rabaul, Truk, and Kavieng.

"The Jap reaction to our penetration has been highly erratic. They have made strong bids to break our supremacy of the skies followed by periods of complete inaction. Jap aircraft have attacked our air bases again and again, disregarding huge losses,

and then, changing their policies 100 per cent, have refused battle. They do not seem to have any strategic plan for defense, but rather counterattack haphazardly as if they sensed that nothing they do can stop the increasing penetration of our aircraft, and—I'll let you in on a secret—nothing can.

"Jap propaganda reflects a similar type of erratic wavering. One day an admiral will say: 'The people on the home front must not become intoxicated with war victories.' The following day their radio will state: 'The war situation manifests a grave and serious aspect.'

"There is good reason for such indecision and worry. Our air strips are constantly drawing the noose tighter around the Japanese empire.

"As with Germany, this job will not be easy. It will be no pushover. Far from it. Because of the distances, the climate, the geography, and the topography, much effort, long, hard hours of labor, intense suffering, heroic bravery, and great ingenuity will be demanded of our men. But we will be equal to the task, no matter how long it takes nor how difficult it is to accomplish."

[Endorsed]: Filed 4-6-44.

Mr. Anthony: And from page 13 of the same periodical I offer an amended statement that appears in relation to Americans of Japanese descent.

The Court: Just a moment, now; you have gone a little too far. [403]

Mr. Anthony: May I have that and I can indicate that? It is not indicated on there.

The Court: Well, this Exhibit "B" from the "Register", containing Halsey's views, which part of that did you offer? Is it the entire article of Admiral Halsey's views, is that what you want?

Mr. Anthony: That is correct.

The Court: Instead of just dumping a lot of documentary stuff into the Court's hands, I wish you'd explain as you go along what it is that you are offering to put into the record and for the Court.

Mr. Anthony: Very well, your Honor, I shall do so. Exhibit "B" has been received in evidence, if the Court please, as a statement appearing in the Army and Navy Register which contains a direct quotation from Admiral Halsey in regard to the progress of the Pacific war, in which statement the Admiral answers the question, where is the Jap fleet? The quotation from the Admiral himself I shall not read, but it will be in evidence here; it indicates very clearly that the Admiral's opinion is that if the Jap fleet should come out our fleet is ready for them; and, as the Admiral says, "Ours would be afloat and their at the bottom of the sea."

The Court: Halsey says that?

Mr. Anthony: Those are Halsey's views, your Honor. I would like to offer in evidence a statement appearing in the same "Register, on page 13, with reference to Americans of Japanese descent. [404] The purpose of this——

The Court: By whom?

Mr. Anthony: This is a quotation from the action of the War Department in regard to admitting Japanese into the Selective Service System. I might state for the Court's information that shortly after the outbreak of war Japanese were not permitted to participate in the Selective Service System. Thereafter, by reason of the extraordinary services rendered by persons of that race, notably in the Italian campaign, the War Department has changed its view and Japanese are now available for induction in the regular way like any other American citizen. This is a statement which reports the action of the War Department in making that change. And it says: (Reading)

> "The excellent showing which the combat team has made in training and the outstanding record achieved by the 100th Battalion (a former Hawaiian National Guard unit) now fighting in Italy were major factors in the adoption of the present plan."

The purpose of this evidence, if the Court please, is that it addresses itself to that part of the petition which I gather by innuendo the Respondent——

The Court: You mean answer to the petition.

Mr. Anthony: The answer—that part of the answer which by innuendo endeavors to cast some reflection upon the Japanese of this Territory. I want to produce before this Court what the official statements of the War Department and the highest Governmental authorities in the United States are in that regard. This is part of the evidence on that issue. [405]

Mr. Ennis: If the Court please, if we are going to have a general discussion of the evidence as it is put in, I would like to just comment on the record that it is not the purpose of the answer or return to cast any reflection on any part of this population, but it is true that there is an internment program for persons believed to be dangerous by the military commanders. And I think upon examination it would appear that that paragraph to the return and answer refers to the military necessities of that program.

The Court: That second photostat offered, from the Army and Navy Register is received in evidence as Exhibit "D". The date of that is the same as the other, January 22nd?

Mr. Anthony: The same date, your Honor.

(Exhibit "D" of the Petitioner was received in evidence.)

PETITIONER'S EXHIBIT "D"

ARMY AND NAVY REGISTER

AMERICANS OF JAPANESE DESCENT

Plans have been completed for the reinstitution of general selective service procedures for American citizens of Japanese descent.

Under the War Department plan, Japanese-Americans considered acceptable for military service will be reclassified by their Selective Service Boards on the same basis as other citizens and called for induction if physically qualified and not deferred.

Last February the 442d Combat Team, composed of Japanese-American volunteers, was formed. In a letter to the Secretary of War commenting on the formation of this unit, the President said:

"No loyal citizen of the United States should be denied the right to exercise the responsibilities of his citizenship regardless of his ancestry. The principle on which this country was founded and by which it has always been governed is that Americanism is a matter of the mind and heart; Americanism is not, and never was, a matter of race or ancestry."

The excellent showing which the combat team has made in training and the outstanding record achieved by the 100th Battalion (a former Hawaiian National Guard unit) now fighting in Italy were major factors in the adoption of the present plan.

[Endorsed]: Filed 4-6-44.

Mr. Anthony: I now offer, if your Honor please, an article by Lt. General Robert C. Richardson, which appears in the Army and Navy Journal of the issue dated December, 1943. This is an article prepared by General Richardson. It deals with the civil population of Hawaii. The title of the article is "Hawaii—Fortress of the Pacific." And in regard to the Japanese of this community the General has an expressed statement: (Reading)

"The dangerous and potentially dangerous aliens and citizens have been arrested and in-

terned by the Army and the remainder have proved on innumerable occasions that they are loyal to America. Unquestionably, the Japanese here entered the war under a cloud of suspicion from other races and have had to demonstrate their loyalty. They have done it by refraining from any acts that might cast suspicion on them or on their community." [406]

There are many other statements by the General which are of importance and significant, if the Court pleace.

The Court: Received as Exhibit "E".

(Petitioner's Exhibit "E" was received in evidence.)

PETITIONER'S EXHIBIT E

HAWAII—FORTRESS OF THE PACIFIC

by

Lieutenant General Robert C. Richardson, Jr.
Commanding General, Army Forces,
Central Pacific Area

The unique position of Hawaii in the Pacific War was well described by Robert P. Patterson, Undersecretary of War, on his visit to this theater a few months ago. "Hawaii," said Mr. Patterson, "is the seaward bastion to the western approaches to our mainland . . . Hawaii's first line is far at sea, held by the continuous patrols of air and water lanes which guard these islands against surprise. The defenses of the islands themselves, strongly manned

by garrisons in a high state of training, are heartening evidence of how much has been done here in twenty months of war . . .

"But until peace comes again it is the defenses of Hawaii which must have our first attention. Then . . . it will be a peace unthreatened by sudden death from the skies. Till that menace is wiped clean from the western world, Hawaii will remain a battery of tremendous and overwhelming firepower, aimed at the heart of Japanese aggression."

America's fighting men and civilians in this area have a special interest in the victory over our Axis enemies, for it was here on December 7, 1941, that the Japanese struck the foul blow that plunged the United States into the war.

Since that day of Japanese infamy, Pearl Harbor has recovered to become an even greater, more active base of operations than before. And the Army has increased the fighting strength of these Islands many times. Many of the blows against the Japs already have come from Hawaii. The Battle of Midway was new and eloquent proof to the whole world —and especially to America's enemies—of the power that is concentrated in this part of the Pacific.

The internal situation in Hawaii is complex, but it has been utilized effectively and efficiently to contribute to the war effort to the fullest extent. Unique features of Hawaii's wartime operations include: a population of diverse races, one-third of whom are of Japanese blood, but most of whom are of American nationality; two large industries, sugar and pineap-

ples, which, like the rest of the economic structure here, have not been disrupted by wartime operations, but are contributing to them in many concrete ways; the innovation of martial law for the attainment of a maximum amount of security for this vital theater; the existence of the first American volunteer civilian defense groups to work under an attack on U. S. soil.

The dangerous and potentially dangerous aliens and citizens have been arrested and interned by the Army and the remainder have proved on innumerable occasions that they are loyal to America. Unquestionably, the Japanese here entered the war under a cloud of suspicion from other races and have had to demonstrate their loyalty. They have done

(Photograph)

Lieutenant General Richardson addressing U. S. Army troops at an advance base. This photo was taken just prior to his assumption of command at Hawaii.

it by refraining from any acts that might cast suspicion on them or on their community. They are doing it in still other ways. Two examples come to mind. One is the response their young men showed when nearly 10,000 volunteered in these Islands for enlistment in a combat team of the Army which is now training on the mainland. They surpassed the Army quota. Only recently, the United States Treasury Department presented a citation addressed to

"Citizens of Japanese Ancestry, Honolulu, Hawaii," in recognition of their direct donation of $10,340 for "Bonds for Tokyo." Their purchase of war bonds and their contributions to Army and Navy relief societies and the Red Cross are also high.

Martial law was established in Hawaii December 7, a matter of hours after the Japanese attack. Governor Joseph B. Poindexter placed the territory under martial law and suspended the writ of habeas corpus, leaving the conduct of governmental affairs in the hands of military authorities.

The civil governor's action was approved immediately by President Roosevelt. A sudden readjustment of civilian life was the result. Because of the danger of additional enemy air attacks, a nightly blackout was imposed. For additional safeguards of civilian communities and military installations, the military jolice joined forces with the civilian police and took over the territory's major police duties.

The office of the Military Governor was established at historic Iolani Palace, seat of the territorial government, to supervise all civilian affairs, and an executive was designated by the Commanding General. General orders issued by the Office of the Military Governor became the "law of the land."

Before wartime Washington was completely geared to handle civilian affairs in the crisis, the Office of the Military Governor had installed its own warfront system of price and food control, had rationed gasoline and tires, adopted wartime labor

policies, and regulated the importing and distribution of critical materials and supplies.

Aside from security, the primary task of the Military Governor was the maintenance and upbuilding of a steady stream of supplies to Hawaii. These tasks were met by the establishment and staffing of the food control, materials and supplies control, labor control, cargo and passenger control, and the planning and priorities sections of the Military Governor's office.

Hawaii's military government was something new in American governmental processes, but it is noteworthy that during absolute military control of the civilian community a majority of those administering the affairs of the Military Governor'c office were civilians. Section heads and administrators were, for the most part, Army officers, many being civilians who had held reserve officer status and who were called to duty immediately.

With the declaration of martial law the civilian courts were closed. Trial of all offenses were handled by military commissions and provost courts, and legal procedure was geared to wartime tempo. Gradually, the functions of civilian courts were restored and when functions of the military government were relinquished to civilian authorities March 10, 1943, the writ of habeas corpus remained suspended and the military reserved the right to hear cases in which members of the armed forces were involved.

The transfer was made after a conference of military, civilian and cabinet officials in Washington.

Many of the controls were passed back to the civilian government but martial law remained in effect.

Restrictions and regulations designed to safeguard the island's security are many, including rigid control over the movements and privileges of enemy aliens, chlorination of water supplies throughout the territory, and other special health and safety measures.

Generally, all orders and projects of the military governor are accepted with a minimum of complaint by a civilian population which realizes it is living in the war zone.

Of inestimable assistance to the Military Government was a blueprint which a foresighted civilian community had been perfecting painstakingly, since the middle of 1940, a year and a half before the "blitz." The plan, drawn up with the professional aid of the Army and Navy, had provided for many of the varied and seemingly endless contingencies of war.

Before the terrible day and night were over, the diverse but cooperating organizations which executed the numerous measures to aid and protect civilians in the islands had become the nucleus of Hawaii's first office of Civilian Defense.

Outstanding among the civilian components which had prepared themselves and their communities for a disaster, were the volunteer police, chosen from outstanding young men of the community, the medical and hospital evacuation committee and the Honolulu Mayor Major Disaster Council, whose origins

dated back a year and a half. Innumerable committees of the disaster council worked feverishly and effectively during that dangerous and trying time; including groups of engineering, burial, transportations, communications; light, power and fuel; personnel, public information, water supply, streets and highways and mortuaries.

Since the Territorial OCD has absorbed many of the original personnel, volunteer and full-time, who first made up those pre-war committees which were to function so admirably when the enemy struck. Today, the OCD's many functions are so necessary and so familiar that the territory looks upon this island-wide organization as an indispensable agency, whose main purpose of "relieving the military for combat and providing protection for civilians by civilians" is an unquestioned necessity. On all the islands for OCD now has some 27,000 volunteer workers.

Among OCD activities and achievements are these: the first complete registration and fingerprinting of an entire civilian community in the United States, involving several hundred thousand people; construction of many splinter shelters; bombproofing of utilities; construction, manning and operation of special hospitals and evacuation centers; cooperation, financially and in other ways with existing hospitals; supervision of civilian nursing activities; erection and operation of gas decontamination centers; supply and coordination of the distribution of army gas masks, assumption, with the relaxation of martial law of many civilian transportation, supply

and food activities, formerly operated by the OMG; aid in the Americanization program, etc. The public schools' contributions to this whole program, in the use of volunteer teacher and administrative personnel and in many training aids, as well as the financial and personnel contributions made by business groups, church, professional, Red Cross and other organizations and individuals, have helped make the enormous program a success.

Another form of volunteer endeavor which is noteworthy for its success and the wholehearted and patriotic attitude of its participants is the organized Defense Volunteers, of whom there are thousands on each island. These groups, with army uniforms and equipment but with their own insignia and rank, stand ready at a moment's notice to be absorbed into the Hawaiian Department in the event of invasion or other war emergency.

It is the co-operation, thought and plain hard work, freely given by both civilians and military personnel, that makes Hawaii the great fortress it is today. It is proud to be so located that it is an integral part of our mainland defense, and it is alert and ready to fulfill any obligations that its strategic position may bring it.

[Endorsed]: Filed 4-6-44.

Mr. Anthony: I now offer in evidence, if your Honor please, an article appearing in the Army and Navy Journal, dated December 15, 1944, Volume 81, on page 575, containing an article by Admiral Halsey, or rather an article with reference to Admiral Halsey, containing a quoted interview with him, and also to the Secretary of the Navy, with reference to where the Japanese fleet is and the readiness of our fleet to meet them. (Showing Court a photostat)

The Court: Received as Exhibit "F".

PETITIONER'S EXHIBIT F

Ready for Jap Fleet

Admiral William F. Halsey, commander in chief in the South Pacific area, this week expressed his conviction that even in the event of a concentration of Japanese sea power for the purpose of one supreme counter-blow the Pacific fleet is able to cope with the situation. When asked the question at 11 Jan. press conference of the Secretary of the Navy, Admiral Halsey, who is in this country for about ten days, replied: "Decidedly, yes," adding that in the event of such a concentration the enemy could put up a stiff fight. He does, however, consider the Japanese fleet to have been seriously crippled by American forces.

Asked if he considered the enemy base at Truk to be a point which must of necessity be taken, he replied: "I can tell you the only definite place that has got to be taken, and that is Tokyo, and don't let 'em stop until they get there."

He added a warning to the American people against the acceptance of peace offers before this final goal is reached.

Japanese planes, said Admiral Halsey, are as good and possibly better than they ever were but the enemy's pilot material is distinctly on the down grade, many pilots in enlisted grades now being noted in place of the officer pilots employed formerly.

In speaking of the replacement of enemy losses, he stated: "They are carrying on a building program which we hope and believe is not doing too well. I think they have lost a tremendous number of cruisers."

Telling of the crippling of the Japanese supply lines by our air, surface and submarine force, he said: "They go into a place first with shipping, and when they get severely hit they go in with barges. We got some of these with troops on and made good Japs of them. They next use submarines, and then as a last resort they let them starve."

Telling of the work accomplished by the Seabees, he said: "It just beggars description. Munda airport is today as fine an airport as any you have in the United States."

Urged by Mr. Knox to tell of the part which officers of the Naval Reserve have played in this area, he answered: "We don't think of Regulars and Reserves, they are all Naval officers and are all doing a splendid job. I don't believe that this great country has ever before produced as fine fighting men as we have today."

[Endorsed]: Filed 4-6-44.

Mr. Anthony: I'd now like to offer in evidence an article appearing in the Army and Navy Register, dated March 4, 1944, Volume 65, No. 3352, which is an article by Major General Willis H. Hale, U.S.A. Commanding General, U. S. Army 7th Air Force. This article, if the Court please, contains an elaborate discussion of the progress of the war in this area. The General states in this article that the key to the Central Pacific areas is the Marshall Islands. He also states a fact which will be of interest to this Court: (Reading)

> "After December 7, 1941, the imminent threat of invasion of the Hawaiian Islands was not lifted until the battle of Midway. Then we required bases from which to operate. These were gradually built up 2,000 to 2,400 miles from Oahu in the Phoenix and nearby islands and later in the Ellice group." [407]

The article, if the Court please, has detailed professional information in regard to the campaign in this area.

The Court: Received as Exhibit "G".

(Petitioner's Exhibit "G" was received in evidence.)

PETITIONER'S EXHIBIT G

ARMY AND NAVY REGISTER

Washington, D. C., March 4, 1944

Marshall Islands Campaign

Maj. Gen. Willis H. Hale, U. S. A., Commanding General, U. S. Army 7th Air Force, at a press con-

Petitioner's Exhibit G—(Continued)

ference on March 1 stated that capture of important Marshall Islands has won from the Japanese the key to the entire central Pacific and advanced by several weeks the time table of our march to Tokyo.

It is just a little over three months since the 7th Air Force aggressively took the air offensive in the central Pacific to prepare for future combined operations with sea and ground forces. Prior to that time the 7th was engaged in defense of the Hawaiian Islands from the very serious threat of invasion, in preparing bases from which to operate, in building up its striking strength and in training crews for operations in what we, the vast ocean, and the weather have made the most experienced Japanese pilots believe is the most difficult theater of war in which to maintain sustained air combat.

After December 7, 1941, the imminent threat of invasion of the Hawaiian Islands was not lifted until the Battle of Midway. Then we required bases from which to operate. These were gradually built up 2,000 to 2,400 miles from Oahu in the Phoenix and nearby islands and later in the Ellice group.

These distances are important. Any understanding of the war in the Pacific must be based on an appreciation of distance. Many people in the United States have virtually no conception either of its watery vastness or of air fighting conditions in the central Pacific. The mission of the 7th Air Force, present and future, involves land-based air operations in a theater which extends over some 16,000,000 square miles, or more than five times the size of the

Petitioner's Exhibit G—(Continued)

United States. The climate is wonderful in much of this weather, but the weather is awful. It is rapidly changing and treacherous, and dependable forecasts are rarely available to the air crews of the 7th Air Force. In operations against the Marshalls, for example, 7th Air Force flyers were faced with a "moving front" which sometimes reached an altitude too high to fly over and which often forced the pilots to fly, in a driving storm, a few feet above the water."

Having occupied the Marshals for more than 20 years, the Japs were fully cognizant of these conditions. This was possibly a major reason why they have not poured so many replacement planes into this area as they have done, despite their continuing heavy losses, into the New Britain-New Guinea sector. There was no use sending very large numbers into the central Pacific, where often their pilots couldn't fly them.

Although we had previously attacked Japanese installations there, the 7th Air Force began its intensive and systematic bombing in the Gilbert campaign on November 13. Our principal targets were Tarawa, Makin, and Abemama, in addition to several supporting bases in the Marshalls.

That campaign is no longer news. There is, however, one comparison between the Gilbert campaign and the Marshalls campaign which is of note: The 7th Air Force bombed the Marshalls for 70 days prior to the landing, while the Gilberts were systematically bombed for only one week.

Petitioner's Exhibit G—(Continued)

Japanese Homeland to Be Bombed

One of the objectives of the air war in the Pacific is to secure a chain of bases which will put the Japanese homeland within effective range of our heavy bombers. The Marshalls operation was a long step in carrying out that plan.

The mission of the 7th Air Force in the preparation for and during the actual invasion of the Marshalls was to deny to the Japs the use of their air power and thereby remove the awful hazard faced by any invasion fleet that a determined attack by land-based enemy aircraft may seriously cripple major fleet units. So successful was the 7th in the performance of this mission that the extensive naval forces participating in the assault and occupations of Kwajalein and Majuro—the largest ever assembled in the Pacific—were not at any time—before, during or after—attacked by as much as a single hostile aircraft.

On one island where the Japanese brought in replacement planes, the 7th bombed out the radar station. It was therefore possible for carrier-based planes to attack that island with complete surprise and to knock out in one blow the entire Japanese force of some 60 airplanes.

The question has been asked, Would it have been possible to make another Pantelleria out of the Marshalls operation? It was not sufficient to render useless the Marshall Islands to the Japanese, as they were needed by our air forces for air bases. The 7th Air Force was, however, well on its way to ac-

Petitioner's Exhibit G—(Continued)

complish the neutralization of the five principal Jap bases in the Marshalls as early as two weeks before the occupation. (By neutralization is meant denying the enemy the intended use of a base.) At that time two of the important islands were 80 per cent neutralized, one was 60 per cent, one 50 per cent, and one 20 per cent. By the time of the assault the "neutralization" had proceeded much further, but it can never be complete unless the enemy abandons the air base, a practice for which the Japs are not particularly noteworthy. However, due to attacks from the air, the Marshalls had ceased to exist as a formidable bastion in the Jap outer perimeter of defense.

The 7th Air Force, by its day and night bombing of all major Japanese installations in the Marshalls —with Liberators, Mitchells, Dauntless, P-40 Warhawks, everything we had with wings on it which could carry a bomb—to a large degree helped to render impotent the extensive ground defense installations which the Japs had developed on several of the islands and on which they had confidently counted successfully to defend those islands.

Due in part to the impartiality of our bombings, the Japs didn't know where to expect the Marshalls assault. Reports from our aircraft showed that they were redisposing their forces prior to the time of the invasion and in anticipation of it; but they were out-smarted.

In addition to its operation in preparation for the Marshalls occupation, the 7th also supported the

Petitioner's Exhibit G—(Continued)

assault by successfully dropping 2,000-pound "atoll busters" on Jap gun emplacements defending Kwajalein and by unremitting attacks on other Jap islands which rendered them useless as supporting bases in the defense of Kwajalein and Majuro.

In the Marshalls operation the 7th Air Force destroyed or probably destroyed some 21 enemy naval or cargo vessels and damaged, in many cases seriously, at least 29 more.

In the Marshalls campaign from 80 per cent to 92 per cent, depending on the type of plane involved, of all bombs dropped by the 7th Air Force hit the target at which they were aimed. This record is as great a tribute to the excellence of the Norden bomb sight as it is to the skill of the 7th Air Force air crews. We use the Norden bomb sight exclusively in our heavy bombers.

The adaptation of the 75-mm. cannon in the Mitchell bomber to the requirements of the central Pacific theater was an interesting aspect of the Marshalls campaign. Used experimentally elsewhere, this was the first time it played an important role in a specific operation. This cannon proved to be a highly formidable weapon with a surprising degree of accuracy. It was used with good results against shipping, but particularly the "flying cannon" served to neutralize Jap ack-ack and automatic weapons fire which had taken a heavy toll of our Mitchell bombers in their minimum-altitude attacks against Jap island installations.

Petitioner's Exhibit G—(Continued)

The Mitchells, flashing in just skimming the water at more than 250 miles an hour, presented a point-blank target. But with the "flying cannon" the Mitchells were able to drive the Jap gun crews from their weapons and in many cases to destroy the weapons themselves. In the approach to the target one plane could get off as many as 10 shells. With such fire power even a small formation of Mitchells could lay down a considerable artillery barrage. The Japs could not stand up to it. This use of this cannon in the Mitchell does not in any way impair the bomb load, the speed, or the range of the aircraft.

As a medium and heavy bomber team the Mitchell-Liberator combination is proving itself beyond our greatest expectations practically every day in the Pacific. The planes fly, shot up, through weather so turbulent it threatens to pull them apart. Almost never do they have fighter protection; the distances are too great. Frequently they must fight their way into and out from a target. Sometimes they get blasted full of holes; sometimes they get motors shot out, but just about always, if the wings stay on, they get home. The men and women who are building those airplanes deserve great credit.

The Marshall campaign provided the Japs with a handwriting on the wall—or a handwriting in the sky—which must be legible to all of them. The pattern for the future—at least so far as the Air Force is concerned—will be to render ineffectual every island group which stands between us and the Japanese homeland. The 7th Air Force is already blast-

Petitioner's Exhibit G—(Continued)

ing at the Carolines. Anyone who wants to know where it is going from there need only look at the map.

These operations are largely concerned with securing air bases, but they are in no sense "island hopping," a term which has been used largely to indicate a tortuously slow approach to Japan. Through combined operations with the Navy and the marines, we are advancing by leaps and bounds. The 7th Air Force commenced its bombing of the Gilberts on November 13 from bases roughly 4000 miles from Tokyo. About 85 days later we were set in the Marshalls, and our bases there are about 2,500 miles from Tokyo. Thus was gained 1,500 miles, an average of more than 17 miles a day.

Those Who Fight

Before summarizing the Marshalls campaign a few further remarks about the 7th Air Force and the men in the Air Forces seem appropriate. The men who fight the air war over the Pacific carry on as though a battle as is being waged anywhere in the world. They don't live in comfortable buildings; they sleep on canvas cots in tents and under mosquito netting. Their showers are gasoline drums with a nozzle, and they wash and brush their teeth and shave in tin hats. They are 2,400 miles from the nearest American community, the nearest dance, the nearest normal social life. If they are shot down or disabled over the target they face what to them is the stark horror of capture. If they go down in

Petitioner's Exhibit G—(Continued)

the ocean their chances of rescue, despite the vigilant Navy rescue service, are problematical. Yet they must fly constantly. During January every bomber in the 7th Air Force forward echelon averaged six missions. Considering the distance traveled; that is, in my opinion, more flying per airplane than in any other theater in the war.

Because of conditions, the 7th Air Force has had to become a versatile air force. Bombers are used occasionally as fighters, and fighters are regularly used as bombers.

The fastest P-39 in the Pacific is a night fighter built by 7th Air Force engineers from a reclaimed fuselage and spare parts. Heavy bombers of the 7th Air Force constantly have to land and take off from strips which any rule book will say are impossibly short for a B-24.

The 7th developed its convoy system for ferrying fighters over long distances in which the fighters fly formation on a B-24, which does the navigating, a hazardous but necessary undertaking because of weather. The 7th has developed its own transition training schools, as every crew member must have a postgraduate course before he is qualified to fly in the central Pacific.

The 7th Air Force is operating bombing missions longer than those in any other theater. The longest was 2,769 miles, and the average is more than four times the distance from London to Berlin. All flights cover great water distances with no intermediate

Petitioner's Exhibit G—(Continued)

landings. The usual checkpoints, such as rivers, mountains, and railroads, are nonexistent.

The navigation must be perfect. Targets are pin points on islands which themselves may be smaller than the factory area of some prime targets in Germany. Is isn't enough that they hit the island; they must hit the target. Seventh Air Force bombardiers must be able to get hits from an altitude of 12,000 feet, an average of less than 250 feet from the center of the aiming point. This is doubtless the most consistently accurate bombing being done anywhere in the world.

In a mission over Rongelap Liberator bombers were assigned the job of knocking out a radio station in a building only 35 feet by 125 feet. The ships went in at 3,500 feet, made a perfect run and dropped their bombs squarely in the middle of the building. They used 100-pound bombs, relying on accuracy not on tremendous concussion.

Salient Features of the Campaign

1. In losing the Marshalls the Japs received a great strategic setback. Tarawa was the key to the Marshalls, but the Marshalls provided the key to the entire central Pacific.

2. In the Marshalls was proved a perfected model of combined operations so successful that we have been enabled materially to put ahead our Pacific time table.

3. The basic reason for the excellent success in the use of land-based aircraft in this combined opera-

Petitioner's Exhibit G—(Continued)

tion is the fact that the 7th Air Force was utilized, as airpower always should be, as a complete unit with an assigned mission. One of the important lessons of the Marshalls campaign is the proved facility with which the land-based aircraft of an Army air force can support and cooperate with the Navy and amphibious forces, in combined operations.

4. The value of strategic bombing in the central Pacific was demonstrated in the Marshalls. In the march across the Pacific land-based airpower will have the dual function proved in the Marshalls of neutralizing the enemy air forces and preparing Jap-held islands so that they can be more successfully attacked by Navy surface vessels and carrier-borne aircraft and stormed by infantry at a minimum of casualties.

5. While the Marshalls compaign, under the brilliant and meticulous leadership of Admiral Nimitz, conclusively demonstrated that properly employed heavy land-based aircraft are a vital factor in operations ahead, this campaign also revealed outstanding evidence of the unexcelled training and equipment of our Army Ground forces in amphibious assault operations, along with our incomparable marines. These, coupled with the unveiling of the devastating power of the guns of our expanded Navy, constitute the first really terrifying threat Japan has ever known

[Endorsed]: Filed 4-6-44.

Mr. Anthony: Mr. Marshall, will you ask the Clerk of the Supreme Court to step inside, please?

GUSTAF K. SPROAT,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please?

A. Gus K. Sproat.

Q. Sorry I kept you waiting.

A. Yes, sir.

Q. You are the Clerk of the Supreme Court of the Territory? A. Yes, I am.

Q. How long have you held that position?

A. Since January 26, 1931.

Q. At my request, have you examined the records of your office and prepared——

A. Yes.

Q. ——a statement relative to the number of cases in that Court and other Courts?

A. Yes.

Q. Do you have that information with you?

[408]

A. I have those figures with me.

Q. May I see them, please? (Witness hands Mr. Anthony several sheets of paper.) Do you have copies of these?

A. I have office copies, but you may copy these.

(Testimony of Gustaf K. Sproat.)

Q. These sheets that you have prepared, what do they consist of, Mr. Sproat?

A. They consist of the number of cases coming before the Circuit and Supreme Courts of the Territory for the last five-year period, beginning in 1939 and ending December 31, 1943.

Q. There are how many Circuit Courts? There were five?

A. There were five; there are four now.

Q. There is a Court of Record on each of the outside islands? A. Yes.

Q. That's where this Court sits, that is the First Circuit? A. Yes.

Q. Do you have the record of the civil and criminal cases in the Circuit Courts as well as the Supreme Court of the Territory?

A. Yes, I have.

Mr. Anthony: We offer this in evidence, if your Honor please.

The Court: Let's see what it shows.

Mr. Anthony: It shows, your Honor, that the Courts have been open, doing their business.

The Court: Well, outside of that discussion, what actually does it show there? [409]

Q. How many cases were in the Supreme Court during that period, in the year 1939, Mr. Sproat?

A. A total of 35 cases. That includes civil and criminal.

Q. And how about the rest of the years?

A. Forty-one for 1940; ten for 1941; twenty for 1942; twenty-for 1943. That takes in a total of 130 over the five-year period.

(Testimony of Gustaf K. Sproat.)

Q. Now in the Circuit Courts, how many cases have you had?

A. We have had civil matters, 11,135 cases; probate, 9,371; criminal, 2,669; juvenile and bastardy, 5,533; making a grand total of all courts of 28,838 cases.

Q. You have that broken down by years?

A. I have those broken down by years.

Mr. Anthony: We offer this in evidence, your Honor please.

The Court: Received in evidence as Exhibit "H".

(Petitioner's Exhibit "H" was received in evidence.)

PETITIONER'S EXHIBIT "H"

SUPREME COURT

	1939	1940	1941	1942	1943	1939 to 1943
Civil	31	35	9	13	20	108
Criminal	4	6	1	7	4	22
Total	35	41	10	20	24	130

CIRCUIT COURTS

Civil, other than probate	2097	2119	2095	2243	2581	1135
Probate	1751	1946	2445	2172	1057	9371
Criminal	789	666	501	156	557	2669
			[In pencil]: 4		22	2691
Juvenile & Bastardy	970	1203	1241	945	1175	5533
Total	5607	5933	6282	5516	5370	28708
Grand Total	5642	5974	6292	5536	5394	28838

(Testimony of Gustaf K. Sproat.) Petitioner's Exhibit "H"—(Continued)

	FIRST CIRCUIT					SECOND CIRCUIT					THIRD CIRCUIT					FOURTH CIRCUIT				
	1939	1940	1941	1942	1943	1939	1940	1941	1942	1943	1939	1940	1941	1942	1943	1939	1940	1941	1942	1943
Law	286	444	333	129	137	21	12	31	7	6			2	1	17	34	41	28	33	
Equity	511	272	86	45	46	2	6	8	5	3	3				10	9	10	12	4	
Probate	1251	1493	1918	1617	418	253	237	218	222	269	40	37	20	26	295	169	151	211	287	
Divorce	911	1056	1297	1763	1945	110	85	102	98	97	19	15	22	29	117	72	80	48	75	
Special proceedings	2	7	21		3						22				37	22	38	41	8	
Criminal	679	510	343	107	420	55	69	83	25	66		3	8	8	50	35	40	36	11	
Juvenile	654	759	839	627	725	67	84	89	73	98	26	33	12	65	245	126	182	168	78	
Bastardy	30	38	39	48	17	14	9	6	3	7			1		4		2	5	2	
Totals	4324	4579	4676	4336	3711	522	502	537	433	546	110	89	65	129	775	469	547	546	496	
Civil	1710	1779	1737	1937	2131	133	103	141	110	106	44	16	24	30	181	137	169	129	120	
Probate	1251	1493	1918	1617	418	253	237	218	222	269	40	37	20	26	295	169	151	211	287	
Criminal	679	510	343	107	420	55	69	83	25	66		3	8	8	50	35	40	36	11	
Juvenile & Bastardy	684	797	878	675	742	81	93	95	76	105	26	33	13	65	249	128	187	170	78	
	4324	4579	4876	4336	3711	522	502	537	433	546	110	89	65	129	775	469	547	546	496	

[Endorsed]: Filed 4-6-44.

FIFTH CIRCUIT					TOTALS				
1939	1940	1941	1942	1943	1939	1940	1941	1942	1943
10	7	5		25	351	504	399	170	185
3	1	3		3	528	289	109	54	62
38	28	78	20	75	1751	1946	2445	2172	1057
40	30	36	45	70	1152	1267	1505	2010	2229
20	14	20	1	65	66	59	82	9	105
20	44	31	5	21	789	666	501	156	557
47	86	82	50	75	920	1144	1190	893	1143
4	6	3	1	4	50	58	51	52	32
182	216	258	122	338	5607	5933	6282	5516	5370
73	52	64	46	163	2097	2119	2095	2243	2581
38	28	78	20	75	1751	1946	2445	2172	1057
20	44	31	5	21	789	666	501	156	557
51	92	85	51	79	970	1202	1241	945	1175
182	216	258	122	338	5607	5933	6282	5516	5370

(Testimony of Gustaf K. Sproat.)

Mr. Anthony: That is all.

Mr. Ennis: No cross-examination.

(Witness excused.)

Mr. Anthony: At this time, if your Honor please, I would like to offer in evidence a series of memoranda issued out of the Hawaiian Department and Central Pacific Area, directed to the troops under that command. These have been produced at my request by Counsel for Respondent, and relate, if the Court please, to the subject of military dress, carrying gas masks, side arms, saluting and passes. I later will argue to your Honor the effect [410] of these. In brief, I might say the purpose is to show that this is, in fact, a supporting base for the training of men and transportation of troops to the front, and not in any real sense a combat area. They cover the period of December 7, 1941, to date.

The Court: What are they entitled or designated?

Mr. Anthony: It is a rather long title, your Honor. The title is "Hawaiian Department and Central Pacific Area Memorandum Circulars, Miscellaneous Letters Pertaining to Military Dress, Carrying Gas Masks, Side Arms, Saluting, Passes." (Handing file of papers to the Court.)

The Court: Received in evidence as Exhibit "I".

(Petitioner's Exhibit "I" was received in evidence.)

Mr. Anthony: I would like to offer, if the Court please, as one exhibit three letters, one from Galen M. Fisher to Charles F. Loomis, dated April 30,

1943; the second letter dated May 12, 1943, from W. A. Gabrielson, Chief of Police, to Mr. Charles F. Loomis; and, third, a letter dated 17 May, 1943, from Kendall J. Fielder, Colonel, G.S.C., A.C. of S., G-2, addressed to Mr. Charles F. Loomis. I have taken these letters up with Counsel. They admit their authenticity in delivery. The only question is their relevancy.

The purpose of these letters is to remove from doubt any innuendo that might arise out of the return and answer in this case as to the Japanese community. I might state in brief what they are. Mr. Fisher wrote to Mr. Loomis in which he asked six definite questions in regard to rumors that had been broadcast [411] in the mainland of the United States, which were known to all of us here to be false .These questions were in turn referred by Mr. Loomis to the Chief of Police and to the head of the Military Intelligence, Colonel Kendall J. Fielder. And written replies over the signatures of those two officers are contained in this exhibit. The reply of Colonel Fielder, head of the U. S. Military Intelligence, is as follows: (Reading)

> "I was surprised to learn that some of the many Island rumors about the Hawaiian Islands during the first few days of the war are still prevalent on the mainland. They have been repeatedly denied by all authorities.
>
> "In connection with the six statements that Mr. Fisher enumerated in a letter to you, it

can be positively stated that all are untrue. It is hardly worthwhile to refute them individually but it might be of interest for you to know that the movie, 'Air Force,' was censored and the scenes about the misuse of the Japanese trucks and the Japanese snipers on Maui were deleted before the picture was permitted to be shown in Hawaii.

"Having been in charge of military intelligence activities since June 1941, I am in position to know what has happened. There have been no known acts of sabotage, espionage or fifth column activities committed by the Japanese in Hawaii either on or subsequent to December 7, 1941.

Sincerely yours,

KENDALL J. FIELDER."

And a letter of similar importance from the Chief of Police.

The Court: Received in evidence as Exhibit "J".

(Petitioner's Exhibit "J-1, J-2, J-3" received in evidence.)

PETITIONER'S EXHIBIT J-1

(Copy)

Galen M. Fisher
11 El Sueno, Orinda, Calif.

April 30, 1943

Mr. Charles F. Loomis
P. O. Box 459
Honolulu, Hawaii

Dear Loomis:

Recently the following statements have been made in southern California and it is important that we be able to deny them, if they are false or partly so.

1. The movie, "Air Force," states that on December 7th Japanese trucks in Honolulu deliberately put out of commission several American air planes.

2. On December 7th American machine gunners cleared Honolulu streets of Japanese.

3. All over Honolulu were signs which read, "Here a Japanese traitor was killed."

4. The Government has prevented the Mainland from getting all the damaging facts as to Japanese sabotage, etc.

5. The Japanese military attacking force bombed Oahu on December 8 and 9, as well as on December 7, 1941.

6. One civilian from Honolulu told a Los Angeles clergyman that his truck had been used for about a week after December 7th for picking up dynamite planted by the Japanese traitors.

I know that the statements in the Tolan Report and by Edgar Hoover and by Blake Clark have stated or implied the falsity of some of these statements, but I should appreciate having your up-to-date reply.

Despite the execution of the American aviators and the statements made by General DeWitt to the House Committee here, the tide is slowly moving in the right direction, I believe.

Faithfully yours,

GALEN M. FISHER

[Endorsed]: Filed 4-6-44.

Mr. Anthony: I'd like to have Counsel admit that Colonel Kendall J. Fielder is a Colonel in the U. S. Army in charge of Military Intelligence during period referred to in the letter and [412] is now in this department head of the Military Intelligence.

Mr. Ennis: Admitted.

Mr. Anthony: I would like to have the admission that W. A. Gabrielson was at the time stated and is now the Chief of Police in the City and County of Honolulu.

Mr. Ennis: Admitted.

Mr. Anthony: That Mr. Charles F. Loomis is an employee of the Office of the Military Governor in charge or connected with the Morale Section of that office.

Mr. Ennis: Mr. Anthony, I don't know about that but I'll be glad to check on it.

Mr. Anthony: The Colonel can tell you right now.

Colonel Slattery: I do not know.

Mr. Anthony: There is a Morale Section under General Order 56, dated January 26, 1942. Do you want a little time before you——

Mr. Ennis: I'd like to have a little time to check on it and make the admission if it is true.

The Court: You have read Colonel Fielder's statement into the record. What is the substance of Chief Gabrielson's letter?

Mr. Anthony: The Chief's statement is in a little more detail, your Honor. The Chief in substance says that he has read the questions submitted to Mr. Loomis by Mr. Fisher of California, and he answers them categorically: (Reading)

> "The statement that Japanese trucks in Honolulu deliberately put out of commission several American air planes is an absolute lie. The Military and Naval [413] Intelligence services and the F.B.I. can verify that there were no Japanese trucks on any airfields, nor did any such trucks do any damage in Honolulu on December 7th.
>
> "2. There was no congregation of any crowds, and the Army, Navy or Marine Corps was not called on to preserve order in the city. No American machine gunners cleared Hono-

lulu streets of any Japanese before, on or after December 7th.

"3. The statement that all over Honolulu had signs which read, 'Here a Japanese traitor was killed,' is another absolute lie.

"4. There was not one act of sabotage attempted by any Japanese or any other person during December 7th or thereafter.

"5. The Japanese bombed Oahu twice; on December 7, 1941, and sometime during the latter part of 1942, when four bombs were dropped in the hills back of the city.

"6. There was no dynamite planted by any Japanese or anyone else in or about Honolulu in December; and no civilian ever used a truck to pick up any dynamite.

"While no acts of sabotage were committed, the Japanese did maintain an excellent system of espionage.

(s) W. A. GABRIELSON,
Chief of Police."

I would like to offer in evidence a letter, if the Court please, from Mr. Ralph C. Scott, Vice President and Manager of the Bishop Insurance Agency, which sets forth the rates of marine insurance, rather of war risk insurance covering marine cargo transported between the Territory and the Pacific Coast, for the period October 5, 1941, down to December 9, 1943. These figures are in the rate per

hundred dollars of insurance. On October 5, 1941, the rate was five cents, which rate continued until December 12, 1941. No, that's incorrect, your Honor. On December 8, 1941, the rate was $4.00 per $100 of insurance, and then the [414] rate dropped down—I'm mistaken, your Honor. The following month it was increased to $5.00 per $100, then it dropped to $2.50, and then $1.50, up again to $2.00, down to $1.50, up to $2.50, down to $2.00, $1.50, $1.00, 87½ cents, December 8, 1943, 75 cents, December 9, 1943, 50 cents.

You have no objection to the admission of those figures and rates?

Mr. Ennis: No objection.

The Court: Received in evidence as Exhibit "K".

(Petitioner's Exhibit "K" was received in evidence.)

PETITIONER'S EXHIBIT K

[Letterhead of]
Bishop Insurance Agency, Ltd.
Honolulu, Hawaii, U.S.A.

April 4, 1944

J. Garner Anthony Esq.
c/o Robertson, Castle & Anthony
312 Castle & Cooke Bldg.
Honoluiu, T. H.

Dear Sir:

Re: War Risk Rates

In reply to your inquiry, the following are the War Risk rates charged by Marine Insurance Com-

panies on merchandise from the Pacific Coast to Honolulu for the periods mentioned:

From Oct. 5th, 1941 to Dec. 12th, 1941	.05
Dec. 8th, 1941 to Dec. 9th, 1941	4.00
Dec. 10th, 1941 to Dec. 23rd, 1941	5.00
Dec. 24th, 1941 to Jan. 21st, 1942	2.50
Jan. 22nd, 1942 to May 13th, 1942	1.50
May 14th, 1942 to June 3rd, 1942	2.00
June 4th, 1942 to June 10th, 1942	1.50
June 11th, 1942 to Dec. 3rd, 1942	2.50
Dec. 4th, 1942 to Jan. 6th, 1943	2.00
Jan. 7th, 1943 to May 16th, 1943	1.50
May 17th, 1943 to June 30th, 1943	1.00
July 1st, 1943 to Aug. 1st, 1943	.87½
Aug. 2nd, 1943 to Dec. 8th, 1943	.75
Dec. 9th, 1943	.50

Yours very truly,
RALPH C. SCOTT
Ralph C. Scott
Vice-Pres. & Manager

RCS:W

[Endorsed]: Filed 4-6-44.

Mr. Anthony: Your Honor, can we have a short few minutes' recess?

The Court: Yes.

(A recess was taken at 9:50 a. m.)

After Recess
(10:13 a. m.)

Mr. Anthony: If the Court please, I'd like to offer in evidence an exhibit prepared by the Tax Commissioner of the Territory of Hawaii, which has been submitted to Counsel, showing the business activity of the Territory from the standpoint view of the Tax Office, covering the years 1941 to 1943, inclusive, giving the gross amount of business done and the amount of taxes paid. The exhibit is broken down into the various types of businesses, sugar, pineapple, canning, wholesale, manufacturing, contracting, amusements, etc.

The Court: Any objection? [415]

Mr. Ennis: No objection.

The Court: Received as Exhibit "L."

(Petitioner's Exhibit "L" was received in evidence.)

PETITIONER'S EXHIBIT "L"

COMPARATIVE STATEMENT OF GROSS INCOME AND CONSUMPTION TAX COLLECTIONS AND THE TAX BASE FOR THE CALENDAR YEARS 1941 - 1942 - 1943

Business Activities	1941 Tax	1942 Tax	1943 Tax	1941 Base	1942 Base	1943 Base	1941 — 1943 Comparison Increase or Decrease Tax	Base
Retailing	2,853,845.42	3,832,233.65	5,003,503.27	190,256,170.98	255,481,987.83	333,566,551.08	2,149,657.85	143,310,380.10
Sugar Processing	790,311.55	776,354.30	973,210.01	52,687,384.14	51,756,901.57	64,880,602.43	182,898.46	12,193,218.29
Pineapple Canning	755,902.08	632,356.10	664,461.03	50,393,421.60	42,157,031.16	44,297,357.67	91,441.05•	6,096,063.93•
Other Canning	41,438.16	5,437.98	1,855.99	2,762,541.25	362,531.65	123,732.53	39,582.17•	2,638,808.72•
Producing	22,939.10	23,371.59	41,597.77	9,175,640.00	9,348,636.00	16,639,108.00	18,658.67	463,468.00
Wholesaling	319,634.06	360,927.25	445,296.29	127,853,624.00	144,370,900.00	178,118,516.00	125,662.23	50,264,892.00
Certain Manufacturing	58,777.68	60,559.18	61,676.06	23,511,072.09	24,223,672.00	24,670,424.00	2,898.38	1,159,352.00
Printing & Publishing	49,519.05	72,795.98	58,074.35	3,301,266.54	4,853,060.47	3,871,619.45	8,555.30	570,352.91
Services	276,173.93	374,599.43	455,246.14	18,411,577.02	24,973,270.39	30,349,712.30	179,072.21	11,938,135.28
Professional Services	108,272.06	127,723.64	165,915.42	7,218,129.82	8,514,900.86	11,061,016.95	57,643.36	3,842,887.13
Contracting	370,994.85	1,985,017.01	1,282,864.22	24,732,965.12	132,334,335.02	85,524,195.80	911,869.37	60,791,230.68
Thea., Amuse. & Radio	106,584.72	110,910.84	184,652.64	7,105,641.51	7,394,048.60	12,310,163.70	78,067.92	5,204,522.19
Interest	53,301.21	44,498.34	39,499.45	3,553,410.23	2,966,553.05	2,633,294.00	13,801.76•	920,116.23•
Commissions	143,097.79	142,346.12	182,770.27	9,539,842.74	9,489,731.85	12,184,672.49	39,672.48	2,644,829.75
Rentals	367,489.23	428,121.19	491,181.35	24,499,257.35	28,541,384.11	32,745,390.61	123,692.12	8,246,133.26
All Other Income	127,333.67	166,324.24	199,329.94	8,488,903.06	11,088,271.57	13,288,649.38	71,996.27	4,799,746.32
Consumption Tax	233,599.98	154,727.97	141,917.70	15,573,316.71	10,315,187.70	9,461,170.51	91,682.28•	6,112,146.20
Sub Totals	6,679,214.54	9,298,304.81	10,393,051.90	579,064,164.07	768,172,403.83	875,726,176.90	3,713,837.36	296,662,012.83
Penalties	2,583.10	2,225.66	2,470.79				112.31	
Totals	6,681,797.64	9,300,530.47	10,395,522.69	579,064,164.07	768,172,403.83	875,726,176.90	3,713,725.05	296,662,012.83
License Fees	29,929.00	30,082.00	33,308.00				3,379.00	
Grand Totals	6,711,726.64	9,330,612.47	10,428,830.69	579,064,164.07	768,172,403.83	875,726,176.90	3,717,104.05	296,662,012.83

• Figures circled in pencil.

OTHER COMPARATIVE DATA

Grand Totals For The Calendar Years:	Tax	Base
1936	3,550,538.58	353,697,498.49
1937	3,639,972.97	394,090,226.23
1938	3,689,379.29	373,936,139.05
1939	4,247,863.40	394,806,253.64
1940	5,135,878.28	433,906,898.71

	1st Div.	2nd Div.	3rd Div.	4th Div.	Territorial
1943 Collections	9,333,565.50	278,068.37	610,692.94	206,503.88	10,428,830.69
1940 Collections	4,416,856.46	179,912.94	409,094.24	130,014.64	5,135,878.28
Increase	4,916,709.04	98,155.43	201,598.70	76,489.24	5,292,952.41
Increase Percentages	111.3%	54.5%	49.2	58.8%	103%

Tax Commissioner's Office
January 15, 1944.

[Endorsed] 4-6-44

tion are true and agree that this stipulation shall be offered in evidence as proof and evidence of the facts herein recited:

"Commercial cargoes shipped into the Territory of Hawaii from continental United States by surface vessels during the years 1942 and 1943 were of the amount of 993,797 tons——"

The Court: That's from Hawaii that you're talking about?

Mr. Anthony: From continental United States to the Territory of Hawaii (continuing):

"——and 1,010,437 tons respectively. The total tonnage of such shipments out of the Territory to the mainland during the same period was 1,310,469 tons and 1,542,769 tons. The total number of civilian passengers entering the Territory by surface vessel from January 1, 1942 to March 31, 1944 was 23,492 and the total number leaving was 31,626. Many hundreds of merchant vessels have cleared the Port of Honolulu from December 7, 1941 to the present time. No merchant ships plying between Hawaii and continental United States have been sunk in the years 1942, 1943 and 1944 but a few merchant ships have been attacked by the enemy.

"There have been a considerable number of flights daily of passenger and cargo planes over the route between San Francisco and Honolulu during the period 1942, 1943 and 1944, depending upon the weather and the demand for such transportation. During 1943 and 1944 there

have been routine daily flights by passenger and cargo planes of the Naval Air Transport Service over the route from Honolulu to Palmyra, Funafuti, Espiritu Santo, Brisbane, Australia and return, over the route between Noumea, New Zealand, Espiritu Santo and return and over the route between Honolulu and Midway and return and over the route between Honolulu, Johnson, Tarawa, Guadalcanal and return. There have been similar flights during the same period by passenger and cargo planes of the Army Transport Command over the routes between Honolulu and San Francisco and return; Honolulu, Canton, Fiji, New Caledonia, Brisbane, Australia and return; Honolulu, Johnson, Tarawa, Guadalcanal, Milne Bay, New Guinea and return; Honolulu, Christmas, Penrhyn, Borabora, Society Islands, Tonga, Fiji and return."

The Court: Will you inform the Court when the last attack [417] was made on ships, surface ships, between the Hawaiian Islands and the Pacific Coast?

Mr. Anthony: Your Honor will, of course, appreciate that the Petitioner in this case is extremely limited in his ability to obtain proof. In other words, it is a proof of an issue that lies almost exclusively within the possession and control of the other side, and the Petitioner is given just such information as the authorities think is proper and should be given.

The Court: Can you give the number of ships making the passage during this term of two years, from the beginning of 1942 to the end of 1943? You say that none of them have been destroyed but some have been attacked during that time. It would be informative to know what part of that time, and whether the attacks continue now to the present time.

Mr. Anthony: Your Honor, I asked in a letter addressed to the Attorney General a series of questions, asking them to produce evidence. Of course, I advised the Attorney General that neither I nor this Court want to have anything come out in the evidence that would be of any aid or comfort to the enemy. I did ask for precise information on the very question that your Honor has pronounced. I don't think I put it in the form of a last attack. Is there any objection to giving that, Mr. Hughes?

Mr. Ennis: I don't think we are prepared to answer that now, your Honor. I appreciate the point of your Honor's question. The Government will consider it. I might say, for the record, that in a public trial of this character, it is the disposition of [418] the Government to assist opposing Counsel in every way that we can, subject to the requirements of the military secrecy. And I will take your Honor's point under consideration.

The Court: Yes, it quite clearly appears from the material that has been put in thus far that the Government has been cooperative in that matter.

Mr. Anthony: That is quite right, your Honor. The Government has very readily furnished information within the limits of what the Army and Navy think is permissible.

LLOYD C. DUNCAN,

a witness in his own behalf, having previously been sworn, resumed and testified as follows:

Redirect Examination

By Mr. Anthony:

Q. Mr. Duncan, approximately how long did that trial of yours take down there in the Provost Court?

A. From about ten to fifteen minutes.

Q. Tell the Court whether or not you were seated during the trial or how was it conducted?

A. Well, the witnesses and myself and the Prosecutor stand before the Judge.

Q. During this ten or fifteen minutes?

A. Yes.

Q. And after sentence was pronounced on you, you were taken away? A. Yes. [419]

Q. Mr. Duncan, do you have any rules of conduct that govern civilian workers in the yard?

A. Well, yes, they have a book of rules of conduct for yard workmen.

Q. Is there anything there about your dealings with marines or sentries?

A. Well, only that when you pass the sentry and while you are in the yard you are supposed to have

(Testimony of Lloyd C. Duncan.)

your identification visible. That's about the only thing that concerns them.

Q. You are supposed to obey the directions of the sentry? A. Yes.

Q. When you told us yesterday that when you were before the Provost Court you knew you were in the wrong, what had you reference to?

A. Well, I meant that I'd be held responsible for any trouble that was caused, like the marine had created an issue and the fact that I had a difference of opinion with him, why he could say that I had been disorderly or that I had been obstructing him in his duties, that I would have no way of refuting that.

Q. That's what you meant by disorderly conduct? A. Yes.

Q. Your talking back to the marine?

A. Yes.

Q. As a matter of fact, your friend Weities did get on that truck that went to Aiea landing, did he not? A. Yes. [420]

Q. Is Weities here in the Territory now?

A. Yes, he arrived the day before yesterday.

Q. And you saw him for the first time while you were on the witness stand, is that right?

A. Yes.

Q. Do you know whether or not there was any reporter present when you were first taken before the Provost Court? On March 1st?

A. Well, there was the girl that was taking notes on it.

(Testimony of Lloyd C. Duncan.)

Q. And there was something said there, wasn't there?

A. Well, yes, just that I didn't have any witnesses and that the witnesses for the Prosecution weren't there, so they postponed it until the next day.

Q. Was there any charge read at any time?

A. Yes, they read the charge then, what I was charged with.

Q. Who read the charge?

A. The Prosecutor.

Q. Do you know his name?

A. I think it is Lieutenant J. G. Trini.

Q. T-r-i-n-i? A. Yes.

Q. He's the fellow that tried you on the following day? A. Well, he was the Prosecutor.

Q. I mean who prosecuted you the following day? A. Yes.

Q. While you were down in the county jail, did you receive any mail ordering you back to work?

A. Well, I received a letter from the Manpower Commission [421] telling me they had sent four previous letters to me to order me back to work, or threatening me with imprisonment or prosecution, and that they had finally ascertained that I was incarcerated in the City and County Jail.

Q. After you were released on bail, did you go back to your work?

Mr. Ennis: Objection, your Honor. I tried to be very lenient and let the Petitioner tell his story, but I really don't see what he did after he was

(Testimony of Lloyd C. Duncan.)

released on bail, as being proper here. That's an issue for the Court.

The Court: Sustained.

Q. Are you working now at Pearl Harbor?

A. No.

Mr. Anthony: That's all.

Mr. Ennis: I'd like to request Counsel to stipulate that the copy of the transcript which I used and which the Petitioner used in his cross-examination yesterday is the correct copy of the original transcript made by the stenographer, based on my assurance that that is true, and subject to any comparison that Counsel wishes to make.

Mr. Anthony: I don't quite understand that, your Honor. Are you offering that in evidence at this time?

Mr. Ennis: No, I am just requesting before the Petitioner leaves the stand——

The Court: What do you mean by the original? Is it the one filed with you? [422]

Mr. Ennis: No, your Honor; it is the Government's intention to offer the original transcript in evidence through the stenographer's testimony. But yesterday the Petitioner was cross-examined upon a copy of the transcript, and I merely want to stipulate that that copy is a correct copy of the original transcript made by the stenographer, upon my assurance that that is so, and subject to a comparison.

Mr. Anthony: I think we'll have no difficulty as to that, but I don't care to enter that stipulation at this time, if the Court please, Mr. Ennis. I am

(Testimony of Lloyd C. Duncan.)

prepared to agree that the papers that Mr. Ennis was using were true copies of what was returned—to the return and answer to show cause.

The Court: Is that satisfactory?

Mr. Ennis: Well, that will be sufficient now, and we can take the original transcript with our testimony.

Mr. Anthony: All right.

Mr. Ennis: No further cross-examination.

(Witness excused.)

JAMES WOODROW DUNCAN,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your full name, please?

A. James Woodrow Duncan.

Q. Where were you born, Mr. Duncan?

A. Sheridan, Wyoming. [423]

Q. Are you the brother of the Petitioner?

A. Yes.

Q. Are you an American citizen?

A. Yes.

Q. Your brother? A. Yes.

Q. Your mother and father? A. Yes.

Q. What nationality are you?

A. Scotch-Irish.

(Testimony of James Woodrow Duncan.)

Q. Your brother is the same, I presume?.

A. Yes, sir.

Q. Mr. Duncan, after you learned of your brother's imprisonment, did you make any effort to ascertain the cause of his imprisonment?

Mr. Ennis: Objection, as irrelevant.

Mr. Anthony: It is just preliminary. I think it will be later, in view of the cross-examination of the Petitioner.

The Court: Well, it would appear to be irrelevant, but as an introductory or preliminary question I think it is proper.

Mr. Anthony: Well, I'll come to the matter right now, your Honor. We can argue it out right here and now. Mr. Ennis. by his cross-examination of the Petitioner endeavored to cast some reflection or make something of the fact that the Petitioner had not endeavored to seek a new trial, as he called it, which is something I never heard of in Provost Court. But I am going to prove that [424] this witness on the stand did that very thing.

The Court: Well, proceed.

By Mr. Anthony:

Q. After you learned of your brother's incarceration, did you have occasion to go down and see the Prosecutor? A. Yes, I did.

Q. Do you recall when that was, Mr. Duncan?

A. Well, that was on the Saturday following, a week from the Saturday following his trial.

(Testimony of James Woodrow Duncan.)

Q. Prior to that time, had you made any inquiry about witnesess that might have seen this incident? A. Yes, I did.

Q. And had you obtained written statements from witnesses? A. Yes.

Q. Did you have these statements with you when you interviewed the Prosecutor? A. Yes.

Q. Tell the Court what transpired between you and the Prosecutor.

A. I went in to see this Prosecutor. I had a statement from witnesses. However, it was not a complete statement. There was certain parts of it that they had not seen, and I wanted to clear up in my own mind just exactly what had taken place. So I went in and I asked to see a transcript of the trial.

Q. Asked whom?

A. I asked the Prosecutor.

Q. What did he say? [425]

A. He said that I would not be permitted to see a transcript of the trial; however, he could practically tell me verbatim the testimony of the two marines.

Q. Did you have a conversation with him about that then?

A. Yes, I talked to him about a half hour altogether.

Q. And did you tell him that you had witnesses to the effect that Lloyd didn't assault the marines?

A. Yes.

Q. What did he say to that?

(Testimony of James Woodrow Duncan.)

A. Well, I asked him if I could get a new trial on the ground of new evidence, that I had statements from witnesses, but he said that statements from witnesses would not be considered new evidence because the evidence was available to us at that time, that it had not come to us at a later time, that if we so desired we could have obtained these witnesses at the time of the trial.

Q. You said you had a written statement with you at that time? A. Yes, I did.

Q. I hand you a piece of paper and ask you if that is the statement to which you refer? (Showing witness a piece of paper.)

A. That's it. (Mr. Anthony hands same to Mr. Ennis.)

Q. Was there anything said about getting a rehearing or seeing anybody else about getting your brother out of jail?

A. I asked the Prosecutor that, and he said that if I would go and see Colonel Morrison and present my case that he might commute the sentence. However, it would not be retried.

Q. Did he say anything else about Lloyd, that he might write [426] a letter?

A. He said after Lloyd had been in there a period of 60 days he would be able to write a letter and ask the sentence to be shortened.

Q. What did he say as to whether or not Lloyd could have gotten a retrial.

A. He said there was practically no possibility of that.

(Testimony of James Woodrow Duncan.)

Q. Now, you discussed with the Prosecutor the fact that these witnesses stated that Lloyd did not assault the marine or resist arrest, did you not?

A. Well—what was the question again, please?

Q. Did you discuss with the Prosecutor the fact that you had witnesses to the effect that Lloyd never assaulted the marines? A. Yes, I did.

Q. And what did the Prosecutor say about that?

A. Well, I told him that I had witnesses that Lloyd did not assault the marine and I wondered if in that case if that would have bearing on the trial as he was prosecuted under that. He said, however, if he disproved that charge they would still back down and pick up the charge of him resisting arrest and interfering with the marines' performance of duties.

Q. Did you have any conversation with the Prosecutor about the fact that Lloyd was right about this truck and the marine was wrong?

A. I was amused by that. The Prosecutor, I asked him, I said, he was telling me—rather, there was another person present [427] and we were talking about it, about the argument that was supposed to have taken place, and so this other person that was present made a remark that in reality the order was directly concerned with whether the truck was there or not. And I said, as a matter of fact, there was a truck there for him, wasn't there? And he didn't know how to answer me. He cleared his throat and got up and spat.

(Testimony of James Woodrow Duncan.)

Mr. Anthony: We offer this statement in evidence, not for proof of the facts therein contained but for proof of what transpired and what connection it has with this witness' effort to bring the matter to the appropriate authorities.

Mr. Ennis: I object to admitting this paper in evidence, your Honor, on the grounds that there has been no basis whatsoever for offering in this record the hearsay statements of those persons about their view of the event.

Mr. Anthony: It is not offered for that purpose, your Honor. Those witnesses will be available to the Court. It is offered for many purposes, however, which are relevant. One is on the question of: if the man had had Counsel at the time, he would have gotten these witnesses. Here is a statement of four witness—three witnesses—three days after he was tried. Had he been represented by Counsel or advised of what his rights were, his rights to a continuance, he would have produced these.

Mr. Ennis: I didn't understand the witness to testify that the Prosecutor read this statement, your Honor. So even for the limited purpose it is not admissible.

The Court: The offer is denied. [428]

Mr. Anthony: May we have it marked for identification?

The Court: Yes, it may be marked for identification. It seems sufficient to show that the wit-

(Testimony of James Woodrow Duncan.)

ness did approach the Prosecuting Officer and endeavored to get a retrial.

(Received and marked Petitioner's Exhibit No. 2 for identification.)

Mr. Anthony: That is all.

Cross Examination

By Mr. Ennis:

Q. Did you make any effort to speak to the Judge about your brother's case, Mr. Duncan?

A. No.

Q. Did you make any effort to speak to anyone except Lieutenant Trini?

A. I went through my shop, to the masters, trying to have something done about it that way. However, nothing was done.

Mr. Ennis: That's all.

(Witness excused.)

Mr. Anthony: If the Court please, I have witness Weities who, as your Honor has heard from the Petitioner on the stand, is now in this port. He will not be available until this afternoon. I would like to offer his evidence. I don't know whether it would be objected to or not.

The Attorney General has advised me that the Governor would like to confer with Mr. Ennis, Mr. Hughes and myself before testifying here, which I think in respect to the Chief Executive the [429] request should be granted. With the exception of taking the testimony of these witnesses that I have referred to, and the Governor, I am prepared

to close my case now, and I suggest that we have that interview at the present time, if that is agreeable to Counsel and have the Court adjourn until this afternoon. The Attorney General is here to speak for the Territory, your Honor.

The Court: It is quite agreeable to the Court that you should have that time for conference beforehand. And what time shall we recess to?

Mr. Ennis: Would 1:30 be satisfactory to your Honor?

The Court: One-thirty is satisfactory. The Court is recessed until 1:30.

(The Court recessed at 10:46 a.m.) [430]

Honolulu, T. H.
April 6, 1944
1:33 o'clock, p.m.

(The hearing was continued.)

The Clerk: Habeas Corpus Docket No. 298, in the matter of the application of Lloyd C. Duncan for a Writ of Habeas Corpus, called for further hearing.

Mr. Anthony: Your Honor, I have in attendance in this Court a number of witnesses that were witnesses to the fact of the alleged assault, two of whom are the seamen that were referred to in the Petitioner's testimony, and they are due to report back to their ship at Pearl Harbor at three o'clock—all of which means that if their evidence

is to be taken it must be taken now. What I am requesting this Court to do is this—and I anticipate an objection on the part of Mr. Ennis to the receiving of their testimony—that I would like to take the evidence of the witnesses and argue to your Honor later the question of whether or not their evidence is admissible in this Habeas Corpus proceeding.

The Court: Upon your statement, what do you expect to prove by them? I don't quite follow the need for it. Do you want to prove the fact of the alleged assault, you say?

Mr. Anthony: No, your Honor. If I said that, I wish to hereby correct it. What I want to prove is the fact that Duncan at no time assaulted any marine, and he did precisely what the marines told him to do, and that there was no occasion for any arrest whatsoever. [431]

The Court: Well, that's an allegation of your petition,——

Mr. Anthony: That is correct, your Honor.

The Court: ——as to why the writ should have been granted. Well, the writ was granted. Let's hear what Counsel has to say.

Mr. Ennis: My position in a word, your Honor, is that the only purpose of such testimony is to retry the facts concerning the altercation between the Petitioner and the marines. Now, as I understand your Honor has ruled that we are not to retry that assault case, and since that could be the sole purpose of such testimony, I submit, your Honor, that it is inadmissible in this Habeas Corpus

proceeding, which is the sole purpose under the rule of the Supreme Court—to test the jurisdiction of the other tribunal.

Mr. Anthony: I'd like to make one statement in reply to that, your Honor.

The Court: Yes.

Mr. Anthony: If we were dealing with a judgment of a court of record that was being attacked or some other—maybe I should call it a regular ordinary court, that is, a court that is recognized by law—then the only thing that would be before the Court would be the judgment. Now, Mr. Ennis in his return apparently has not been satisfied with the so-called judgment of the Provost Court, but he has annexed to his return a complete statement of what was purported to have happened down at Pearl Harbor. In other words, he wants to persuade either this Court or some Appellate Court that the Provost Court did substantial justice [432] down there. That's the obvious purpose of it. Now, if he had just attached and did not propose to introduce in evidence the testimony, which of course is not admissible, if you have a good judgment,—the judgment is the only thing that is necessary—then that would be one thing. Now, I say that he, by attaching this testimony and relying upon it evidently as a support of a valid judgment of conviction, has waived whatever objection he may have heretofore had to a re-examination of the merits of what happened at Pearl Harbor on the day in question.

Mr. Ennis: The difficulty with that, your Honor, is that the reason for which this Provost Court record was attached was to meet the allegations in the petition that the Petitioner was denied Counsel; and it was necessary to put in the transcript to show that he was asked if he wished Counsel, and he agreed to go ahead without Counsel. Now, the judgment on its face would not show the record on that issue. And it was necessary to put in the transcript of the hearing, the testimony, to show that.

Mr. Anthony: Well, time is fleeing, your Honor. It is now twenty minutes to two, and I renew my request that I be permitted to take the evidence of these two witnesses. And I am prepared to argue at length at any time after their evidence has been taken as to the admissibility of such testimony.

The Court: Well, upon that stipulation I will hear the witnesses, subject to be stricken.

Mr. Ennis: I renew my objection.

The Court: All right. [433]

Mr. Ennis: And take exception.

Mr. Anthony: Is Mr. Weities here?

ROBERT WEITIES,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. I'd like the record to show that the U. S. Attorney for the District of Hawaii is here present in Court and able to cross examine this witness, if your Honor please. (To witness) What is your name? A. Robert Weities.

Q. What is your job?

A. Merchant seaman.

Q. Do you know Lloyd Duncan sitting in the Courtroom here? A. Yes, quite well.

Q. How long have you known him?

A. Since 1937, '38.

Q. At the present time you are employed as a merchant seaman? A. Yes, sir.

Q. Do you recall an occasion on the 24th of February when you were ashore in this port?

A. Yes, I do.

Q. Did you see Mr. Duncan on that day?

A. Yes, I did.

Q. This is the first time you had ever been in this port? [434]

A. It is not the first time I had ever been in port; it is the first time I had ever gone ashore at Pearl Harbor.

Q. After you had your dinner, you decided to go back to your ship, did you not?

A. That's right.

(Testimony of Robert Weities.)

Q. With whom did you go?

A. With Lloyd and a friend of mine, a shipmate, Chris.

Q. State to the Court briefly what you did when you got back to it.

A. As it turned out, we didn't have to go through the gate in order to get to the ship, but we had gone to Honolulu by the upper highway and so naturally we didn't know that you didn't have to go through the gate. Pearl Harbor is Pearl Harbor to me. And we got off the bus at the main gate at Pearl Harbor, and the marines put us in the little enclosure there where they put the merchant marine while they are waiting for the truck to take them to the ship. We were there possibly an hour.

Q. How many marines were around there?

A. Oh, there's usually at least four or five there.

Q. All right, and then what happened?

A. And as the truck was about due to come up, there was some question as to whether we were supposed to go through that gate. I asked the marine to make sure, and Lloyd said, well, no, he was positive that we could get to our ship through that gate. It seems that I told him that we were somewhere near Aiea landing and it seems we could have gotten to Aiea landing through the main gate. [435] That's the way I understand it, anyway. So he told the marine at the gate—he told me that we should not listen to the marine, that we could go through the gate, and that led to one

(Testimony of Robert Weities.)

thing and another until there was words between him and the marine.

Q. Just a minute. Did you go through the gate in this truck?

A. Yes, I went through the gate in the bus and then walked through the gate and got on the truck.

Q. Now, how long did you sit in this enclosure?

A. At least an hour.

Q. That is, waiting for the truck to come?

A. Yes.

Q. Now, where did this argument occur?

A. After the hour was over, when the truck was up there, as I believe we may have even missed the first truck that was there on account of the argument.

Q. Now, what happened at this argument? Who came up to whom and who said what?

A. Well, it was the marine that told Lloyd that he had no business even saying anything to him about whether we should go through or shouldn't go through or what was going on. And Lloyd took offense at that, and at no time did Lloyd ever raise his hands against the marine as far as I know. He at least—in order to strike a blow you have to close your fist. I know Lloyd didn't close his fist at any time.

Q. Did you see the marine touch him at any time?

A. Well, he didn't, the marine didn't strike him with his [436] fist, etc. He was just pushed around, I'd say, just roughed up a bit.

(Testimony of Robert Weities.)

Q. What did Duncan do after he was roughed up by the marine?

A. Well, there was some talking going on there, and Duncan said, "You can't do this to me; I'm a citizen."

Q. He didn't know the marines, did he?

Mr. Ennis: I object to that remark and ask that it be stricken from the record.

The Court: It may be stricken.

Mr. Anthony: I have no objection.

The Witness: And there was some argument. The man had a hold of his badge, Lloyd's shipyard badge around his neck, and when he found out that he was a shipyard worker he seemed to think that Lloyd himself was a merchant marine.

Q. Did he say anything about being a shipyard worker?

A. Well, he said, "Oh, a shipyard worker," in a more or less tone of voice, I suppose.

Q. Then what happened after that?

A. Well, they shoved him off and they sat him down on a little bench, and about that time the truck, probably the second truck—I think I missed one; probably it lasted 10 or 15 minutes—and another truck came up and they said, "Well, here's your truck." So I got on this truck and went around to look for my ship, which I didn't find.

Q. Now, at any time did you see Duncan resisting arrest?

A. I didn't see Duncan—no. I didn't. [437]

Q. Did you hear anything about arrest?

(Testimony of Robert Weities.)

A. No, not while I was there. There was nothing about booking him on any charges that I know, not in my hearing at least.

Q. Did you ever see Duncan strike at the marine? A. No.

Q. After this argument occurred, he was told to sit down and he sat down, is that it?

A. Well, he got up and argued a little more, and then they shoved him back down.

Q. But after he finally sat down, why he stayed there?

A. To the best of my knowledge, while I was there.

Mr. Anthony: That's all.

Cross Examination

By Mr. Ennis:

Q. Mr. Weities, you arrived at the gate with Mr. Duncan on the bus and got off the bus and went inside the gate and sat in the enclosure?

A. That's right.

Q. Is that correct? A. Yes.

Q. And Duncan was with you?

A. That's right.

Q. You sat there together for an hour?

A. Yes.

Q. And did a bus pull up inside the gate, or a truck, which [438] you were to take before the first words were spoken with the marine?

A. Yes.

Q. And you had been sitting there an hour be-

(Testimony of Robert Weities.)

fore you asked the marine which truck you were to take? A. That's right.

Q. And it was yourself, and not Duncan, who asked the marine what truck you were to take, is that correct? A. That's right.

Q. And what did the marine tell you?

A. The marine said he wasn't sure whether I could reach my ship through the gate or not, but he didn't think I could.

Q. Now, could you identify that particular marine? Who was that? A. Yes, I can.

Q. What's his name?

A. I haven't any idea what his name is.

Q. Do you recognize him in the Courtroom here?

A. Yes, I recognized him on the street.

Q. Will you point him out?

A. The Corporal is right in the middle of the curtains there (indicating) and the other marine is right on the other side of the lady sitting there.

Q. Will the marine stand? Is this the chap you spoke to?

A. That's the Corporal of the Guard. I believe the other fellow was the one I asked the question of.

Q. Will you have the other one stand up? Is this the marine [439] you asked the question of? (Referring to a marine in the rear of the Courtroom.) A. Yes.

Q. Will you state your name for the record?

Private Hunter: J. C. Hunter, Private First Class, U. S. Marine Corps.

(Testimony of Robert Weities:)

Q. Now, Private Hunter told you that he didn't know whether it was the right truck or not, is that what you say?

A. He wasn't quite certain; evidently we didn't give him full information as to where the ship was, because I had no idea, it was just a matter I knew it was on the other side of the bay there.

Q. But what I'm trying to get there is not what you think, but what the words were as far as you can remember. What do you recall Private Hunter said?

A. Well, let's see, possibly he said something like "I don't think your ship is there, Mac; I don't think you have to come through this gate, Mac," or something of that kind.

Q. Where did you tell him your ship was?

A. I told him as near as I could figure out it was somewhere near Aiea landing. And as it turned out, it wasn't near there but at Pearl City.

Q. Where was it you came ashore?

A. At Pearl City.

Q. What made you think it didn't continue to be at Pearl City?

A. Frankly, I didn't know that was the name of the dock. I knew there was a Pearl City and there's a town that's not even on [440] the waterfront there.

Q. After Private Hunter told you that he didn't think that that truck would bring you to your ship —the ship wasn't at Aiea landing which you suggested—who spoke next? A. Lloyd.

(Testimony of Robert Weities.)

Q. What did he say?

A. He said, "Don't believe the marine; I know you can get to the ship through this gate."

Q. Did he use any profanity in that remark, in those words? A. Lloyd did not.

Q. He did later, though?

A. Not that I know of. He cautioned the marines about using profanity.

Q. What did Private Hunter say when Duncan told you not to pay any attention to Hunter?

A. I don't remember that.

Q. Well, didn't you testify on your direct examination that the marine stated that Duncan should not interfere with his instructions, didn't you so testify?

A. Yes, I believe I did, something to that effect.

Q. Well, who said that?

A. It would have been the marine.

Q. It would have been Private Hunter?

A. Yes.

Q. Then you testified on your direct examination that Lloyd Duncan took offense at the marine's remark. How did he show that [441] he took offense? A. Lloyd took offense?

Q. Yes.

A. Well, how does anyone take offense at anyone? Possibly he makes another remark himself.

Q. Well, what remark did he make?

A. Oh, possibly repeating himself, that the marines didn't always know what they were talking about, something to that effect.

(Testimony of Robert Weities.)

Q. That the marine didn't know what he was talking about?

A. Something to that effect possibly.

Q. Well, now, let's not leave possibly. You testified——

A. Well, I'm sorry if I can't remember the exact words of the argument.

Q. No, I don't want the exact words if you can't remember them. But you did testify that Duncan took offense at the marine's instructions to him not to interfere with the marine's instructions to you. Now, if you say that Duncan took offense, he must have indicated that to you in some way, and I want according to your best recollection how he showed that offense, by words or actions?

A. By words.

Q. And what is your best recollection as to what words they were?

A. Let's see, I'll try to remember that. Well, he repeated that I know that you can get through the gate. I remember that. He said, "I know that you can get through here, through the gate; you can get to your ship." [442]

Q. Did those words indicate taking offense to you?

A. They were certainly contradicting the marine.

Q. Did he use any other words? Did he use any words of profanity at that point in the discussion?

A. Not as I can remember it, no.

Q. Then is it your testimony now that he took

(Testimony of Robert Weities.)

offense because he merely repeated the remark, "Don't pay attention to the marine?"

A. Well, I don't know whether the argument started that way. The argument is over before you take a look at somebody to see if he is red in the face.

Q. Well, what happened next after Lloyd took offense and repeated his remark?

A. Well, there were words between Lloyd and the marine. The first thing I know, he was saying, "You get over here," or something to that effect, and shoving him aside. Naturally, there were a lot of people going in and out the gates and they wanted to get the argument out of the way.

Q. And you were there all the time during these words between the marine and Duncan, is that correct?

A. No, I won't say all the time, no.

Q. Well, up to the time?

A. Up to the time I got up on the truck, I was there.

Q. Now, I see. Were all of these words between Duncan and Private Hunter?

A. No, the Corporal was called out there. [443]

Q. When did the Corporal get into the picture, as you remember?

A. Oh, about three minutes after it started. He came out to find out what was going on.

Q. And did you observe Duncan talking to both Private Hunter and to the Corporal?

A. Yes, they were both there at the same time.

Q. Now, you testified on your direct examination that nobody struck anyone?

(Testimony of Robert Weities.)

A. No one struck anyone a blow with a fist that I saw, no.

Q. Well, did you see anyone strike anyone a blow at all? A. No, I didn't.

Q. So it is your testimony that no blows were struck in this matter which was under your immediate observation all the time? A. That's right.

Q. That's your testimony? And that the marine merely moved Duncan over and sat him down on the bench? A. That's right.

Q. Your answer is Yes? And you observed during this whole period, you observed the talking and the actions between the two marines on the one hand and Duncan on the other? A. Yes.

Q. When did you go on to the truck?

A. About possibly ten minutes, between ten and fifteen minutes after the little argument there. [444]

Q. And it was ten or fifteen minutes after what you call a "little argument" was all over?

A. Yes, I didn't have any idea that anyone would get into any trouble.

Q. And it was ten or fifteen minutes after Duncan was over sitting on the bench?

A. That's right.

Q. Where did you go on that truck?

A. Probably to every pier at Pearl Harbor—probably 30 or 40 men on the truck.

Q. Where did you get off the truck?

A. At the main gate.

Q. Didn't you get off at the pier where your ship was?

(Testimony of Robert Weities.)

A. No, I couldn't reach my ship by going through that main gate.

Q. You couldn't reach your ship?

A. No, we couldn't.

Q. I see. Then is it your testimony that the marine was correct in telling you that you couldn't reach your ship by that truck and that Duncan was wrong in contradicting the marine's instructions to you, is that correct? A. That's right.

Q. I see. When you came back to the main gate, did you speak to either of these two marines or any other marines? A. Yes, I did.

Q. You did? [445] A. Yes.

Q. What was the conversation and with which marine?

A. It was with the Corporal, and he took a bottle of rum away from me.

Q. He did? A. Yes.

Q. What was the conversation?

A. Oh, "What have you got there under your coat? Hold out the bottle." And he said, "You can't go out here with this bottle." So he took me in the office to take the bottle of rum away from me. He brought out a slip to the effect that he had taken it away from me, and then he turned me loose on the highway out there.

Q. You had been drinking with Duncan during that afternoon and evening, is that correct?

A. Yes.

Q. Did you have any discussion with the Corporal about the fact that the original instructions

(Testimony of Robert Weities.)

that had been given to you that you couldn't get to your ship by that truck were correct?

A. Yes, I did.

Q. What was said?

A. He said, "You shouldn't have listened to your friend."

Q. What did you say? A. I said, "Oh."

Q. How did you finally get to your ship?

A. I hitch-hiked.

The Court: How? [446]

A. Hitch-hiked.

Q. Where did you find your ship?

A. At Pearl City at the discharging docks.

Q. So that the upshot of this whole thing was that the instructions you were given initially by the marine guard were correct, and you finally got to your ship by the way they had indicated?

A. I tell you he didn't give me any instructions. He said he didn't think I could find the ship down there by going through the main gate. That was his contention, which was right. But he didn't know where, how I could find the ship. He didn't tell me how I could, because I hadn't given him enough information as to where he could tell me to go.

Q. Well, if he told you you couldn't go by taking that truck down through the main gate into Pearl Harbor, why did you insist on doing it?

A. Well, after all, I thought Duncan had been working there for months and months and he probably knew whether I could get to the landing or not.

(Testimony of Robert Weities.)

Q. You preferred to take Duncan's word to the word of the men who are on duty at the gates?

A. No, not necessarily, no, no, but by that time why the truck was there so I got in the truck to go and see if it was over there.

Q. Well, let me put it this way: You did take Duncan's word instead of the word of the marine?

[447]

A. So far as I got on the truck, I suppose I did, yes.

Q. Now, one final question. You observed this entire altercation between Duncan and the marines, and your testimony is that no blow was struck?

A. Yes.

Mr. Ennis: That's all.

Mr. Anthony: Just a minute. Did you see the marines pushing Duncan at any time?

The Witness: Yes, on the chest.

Mr. Anthony: But no blows?

The Witness: I didn't see them strike a blow.

Mr. Ennis: You didn't see Duncan strike a blow?

The Witness: I didn't see either of them strike a blow with a fist.

Mr. Ennis: Just a minute. You didn't see anyone strike a blow with a fist or object or any other way? All you saw was pushing?

The Witness: That's all.

Mr. Anthony: That's all.

(Witness excused.)

Mr. Anthony: Is there a witness by the name of Chris in the Courtroom?

COLUMBUS MATSLER,

a witness in behalf of the Petitioner, being duly sworn, testified as follows: [448]

Direct Examination

By Mr. Anthony:

Q. What is your name?

A. Chris Matsler, Columbus Matsler. Chris is a nickname.

Q. What's your occupation?

A. I'm a merchant seaman.

Q. Mr. Matsler—is it Matsler?

A. Matsler.

Q. Mr. Matsler, on February 24th of this year, were you in the company of Mr. Duncan and Mr. Weities? A. Yes, I was.

Q. Here in Honolulu?

A. Here in Honolulu.

Q. And did you go down to the Pearl Harbor gate in company with them, accompanied by them?

A. Yes, sir.

Q. Tell the Court briefly what happened to you after you got down to the gate?

A. Well we stepped off the bus and went through the gate and were immediately shuffled into what we call a "bull-pen," a little waiting place there. And, oh, we waited there for some time, I don't know for how long, possibly an hour, three-quarters. And I wasn't exactly satisfied with the idea as to where our ship was and I wanted to know. So I talked with one of the guards. And they didn't know where our ship was or how we could get there,

(Testimony of Columbus Matsler.)

but they did tell me that there would be a truck which would pick us up. [449] So I went back and sat down. And while I was sitting there, then Mr. Duncan and Mr. Weities went out and were talking with the guard again. As to what they said exactly, I couldn't say because I was sitting down for the time that he was speaking with the marine. I believe his name is Fisher. Isn't that Private Fisher? But when the Corporal came out, then they were talking, well, part of the time, rather loud.

Q. Just tell the Court what you saw Duncan do and what did the marine do at that time?

A. Well, Private Fisher came back and was standing by the gate to watch the people as they came through, and the Corporal and Mr. Duncan and Mr. Weities were talking. Well, while they were talking, one truck came in and left. Then another truck came in and we were supposed to get on that truck. I was told myself and I suppose that my friend was told to get to the truck at the same time.

Q. Who told you? A. The Corporal.

Q. You are on the same ship, are you?

A. Yes, we are on the same ship. He told me to get on this truck. So I stepped out to get on the truck, and then I saw that my friend wasn't there, so I came back. And in the meantime, we got—I suppose that he did take the truck.

Q. You what?

A. I suppose that my friend did take the truck. He evidently did. He told me that he did the next

(Testimony of Columbus Matsler.)

day. But at that time I [450] suppose that he did take the truck because I didn't see him at the time, so I went back and I missed the truck.

Q. What did you observe as to any incident between the marine and Duncan?

A. Well, they seemed, the marine seemed to be, well, just a little bit rough in his usage of Mr. Duncan.

Q. In what respect?

A. Well, in fact that Mr. Duncan had said that he contradicted him, and, well he told him to get back into the bull-pen or I will do so and so.

Q. And did he lay his hands on Duncan?

A. Well, not to strike him but to shove or to gesture as if to strike. He didn't strike him. They all had flashlights, and I know that they suggested that they might use them at any time.

Q. I didn't get that. They what?

A. He suggested that they might use their flashlights at any time. Well, one of them told me he'd bat me over the head with it if I didn't step back, and I just stepped back from the truck and I asked a simple question. Then after I suppose that Mr. Weities had gone by that time, I was standing in the office and I saw through the door that they were having quite a scuffle outside.

Q. What did you see?

A. Well, the marine corporal was evidently trying to subdue by words or with his hands in a mild sort of way—I don't know what he was attempting to do or what he thought he could do with his [451]

(Testimony of Columbus Matsler.)

his hands, as he went at it, but there was some rough words. I won't say obscene language used but rather rough words in the air. And then it came up about the shipyard workers, Mr. Duncan being a shipyard worker, and he went, he took hold of his badge and was going to jerk it off his neck, and there was quite a scuffle over that. And he eventually did pull the badge off Mr. Duncan's neck.

Q. And what did Mr. Duncan do?

A. Well, he sat down on the bench.

Q. Did he offer any resistance at any time to the marines after he sat down?

A. No, after he sat down he offered no resistance whatsoever. He sat there very docilely. And the marine came in into the office and there was an officer came down and was talking with him. He eventually—I don't know what length of time elapsed but I do know that officers came in and talked with the Corporal, they talked with the Corporal—the Corporal talked with the other marine, **Private Fisher.**

Q. Did they take your names as witnesses?

A. No.

Q. They never asked you for your name?

A. No, never asked us anything at all.

Q. How many marines were around there that you observed at that time, approximately? Just these two or were there others?

A. Oh, no, there were others. I would say, oh, at least six, five or six. I won't say positively but I know that there were more than the two of them.

[452]

(Testimony of Columbus Matsler.)

Q. At any time did you see Duncan strike the marine? A. No, sir, he didn't.

Q. That's all.

A. I say he did try to hold him off when he was trying to take off his badge, but he didn't strike him. He just held him off with his hands.

Mr. Anthony: That's all.

Cross-Examination

By Mr. Ennis:

Q. Now, Mr. Matsler, try and fix the first time that you observed Duncan talking to a marine. Was he talking to the Private whom you call Fisher? It's probably Private Hunter.

A. Yes, he was talking with Private Fisher first.

Q. Well, I think it is Private Hunter.

A. Oh, well, the Private.

Q. It is the one Private?

A. The Private and the Corporal.

Q. It is Private Hunter. Now, from the time you saw him talking to Private Hunter until the time you saw him sitting inside on the bench, did you have Duncan under your immediate observation during the whole period in which he was talking to both Hunter and the Corporal?

A. Under my observation, yes.

Q. You were watching the whole thing?

A. Yes.

Q. You said the marines subdued Duncan in a mild way with [453] their hands? Just what do

(Testimony of Columbus Matsler.)

you mean by that? Did they let him into the room where the bench was or what?

A. Well, my idea of subduing someone would be to either do it very emphatically or mildly, to lay your hands on him, and if you were to sit one in a chair, you'd push him down, or else you'd be affirmative about it.

Q. Well, just what action did you see in this case? A. In which case?

Q. Well, let's put it this way Which marine did you see subdue Duncan mildly?

A. The Corporal.

Q. Did he put his hands on him?

A. Yes, he did.

The Court: The answer was what?

(The Reporter read the last answer.)

Q. Did either one of these marines, either the Corporal or the Private, Private Hunter, say to you that he would bat you over the head with a flashlight? A. Yes, he did.

Q. Which one? A. The Private.

Q. The Private? How near were you standing to Duncan during all this?

A. Well, it's hard to say. I was standing possibly five feet away when it first started. And to the end of it probably 20, 30 maybe. I don't know how far it is exactly there. [454]

Q. Where were you standing when you were five feet away, in relation to the entrance lane and the exit lane at the main gate? Was it in the entrance or near it?

(Testimony of Columbus Matsler.)

A. Well, the entrance lane comes in and then there is a ledge, a step you might say, that one steps on and steps into the door, and I was standing just at the corner. There's a slit——

Q. You are aware, are you not, that while you were there waiting for your truck, in the interest of keeping the passage clear you are supposed to stay in the waiting place that has been provided?

A. Yes, it was my instructions to be there.

Q. What is it?

A. It was my instructions to be there.

Q. To be where? A. Where I was.

Q. Where you were standing? A. Yes.

Q. And from that point you can see everything that went on? A. Yes.

Q. You testified that you did see Duncan put his hands on the marine?

A. Well, to keep him away from him, yes, when he was pulling his badge. It's a natural reaction.

Q. Did he put his hands on the marine hard enough to bruise his face, for example?

A. Well, no. They did wrestle around a bit over getting [455] the badge. It is possible that it is very easy to scratch one's face or mark by rubbing him on the clothes. It might have been. I didn't notice such, but it might have been. But there was no blow struck.

Q. Duncan's hands might have bruised the marine's face?

A. His hands, no. His clothing possibly.

Q. But he put his hands on the marine?

(Testimony of Columbus Matsler.)

A. Yes, he put his hands on him.

Q. To hold him off when he was trying to get his badge?

A. In fact, they were rather close together. It might have been any part of his body, if there was a bruise. I didn't see one.

Mr. Ennis: That's all.

Mr. Anthony: Thank you.

(Witness excused.)

Mr. Ennis: May I state for the record at this time, your Honor, that Mr. Loomis, who was referred to this morning, is an employee of the Office of the Military Governor?

Mr. Anthony: On the payroll.

Mr. Ennis: He is on the payroll, yes.

The Court: Oh, yes, the Office of the Military Governor. He is the one to whom the inquiry was addressed.

Mr. Anthony: In regard to the Japanese. I'd like now to offer in evidence a series of newspaper clippings which I understand Counsel is going to object to, your Honor. I tried to pick out the ones that he can object to first. I offer in evidence [456] a clipping of the Honolulu Star-Bulletin, dated February 9, 1943, containing a statement by General Emmons.

Mr. Ennis: I have no objection insofar as the only thing offered is General Emmons own statement without newspaper or editorial comments.

Mr. Anthony: How about General Richardson's statement?

Mr. Ennis: Similarly, no objection with similar condition.

The Court: I see.

Mr. Anthony: May this be received in evidence? One exhibit—I'll mark each one separately.

Mr. Ennis: Well, now, I think it should be understood on the record, your Honor, that part of this paper which is being offered contains newspaper comment about the statement.

The Court: I understood that. Now, you agreed that, insofar as the quoted statement of General Richardson contained in the published article is concerned, that could be received in evidence. Is there any other statement there besides General Richardson's? Does it include Admiral Nimitz's statement?

Mr. Ennis: It's a newspaper story about it.

The Court: About Admiral Nimitz's statement?

Mr. Anthony: Not in this one.

The Court: Just General Richardson?

Mr. Anthony: General Richardson and General Emmons. What number will this receive?

The Court: Let me see the thing first. (Mr. Anthony hands [457] the Court a newspaper clipping) Well, it's rather difficult, as far as the first few columns go, to see just at a glance which is General Richardson's statement and which is General Emmons' and which is the comment.

Mr. Anthony: May I suggest this, your Honor? I think in about five minutes, if the Court would adjourn, Mr. Ennis and myself could go over these.

The Court: Oh, I thought that had been done.

Mr. Anthony: Well, I submitted them early in the trial, but I have not had the opportunity to go over them with Counsel.

The Court: We will take a recess for that purpose, then, to give you gentlemen an opportunity to iron out your difficulties, if you can.

(A recess was taken at 2:20 p.m.)

After Recess
(2:45 p.m.)

Mr. Anthony: If the Court please, I'd like to offer in evidence some statements by General Emmons and General Richardson, and I ask that this be received and marked "Exhibit O-1" or a series of them. This sheet has two statements, one by General Emmons, dated January 1, 1943, and the other by General Richardson, dated July 5, 1943. The clipping in the center is not offered, your Honor. I understand there is no objection.

The Court: No objection? Received in evidence as—have you got "N" in?

Mr. Anthony: "M" was the last one.

The Court: Why did you mark this "O"? [458]

The Clerk: It should be "N." The next is "N."

Mr. Anthony: That is correct, your Honor. That would be "N-1" that first set of clippings.

The Court: "N-1."

Mr. Anthony: The text of a radio address by General Richardson of June 7, 1943, "N-2."

The Court: Received in evidence.

Mr. Anthony: The text of proclamation of Admiral Nimitz proclaiming himself the Military Governor of the Marshall Islands.

The Court: What date?

Mr. Anthony: It is dated January 31, 1944, the proclamation. The clipping is dated February 4, 1944.

The Court: Received "N-3."

Mr. Anthony: The text of a speech of General Richardson before the Chamber of Commerce, dated July 15, 1943.

The Court: Received "N-4."

Mr. Anthony: The text of a message from General Emmons to the people of the Territory of Hawaii in the Star-Bulletin of May 27, 1943. Only the text is offered.

Mr. Ennis: Now, your Honor, in connection with the last one of General Emmons, I think that if his views on the situation are being put in that we should put in all of his views. And I would like to offer at the same time, so that it would be in the proper place in the record, General Emmons' statement as reported in today's Advertiser in connection with the possibility of attack by the Japanese on the West Coast of the mainland. I think that should be [459] put in at the same time.

Mr. Anthony: That is subject to the objection which Counsel is urging in excluding a number of statements which he is not prepared to receive, namely, that they are just off the record remarks. I'd like your Honor to withhold your ruling on that until we ascertain if similar statements by Admiral

Nimitz and others of the high command are to be received in evidence. I have no objection to all of these statements of the Army and Navy Command going in evidence, but I understand that Council will seek to exclude a number of them which I wish to offer.

Mr. Ennis: No, the only part which I wish is not the editorial or newspaper comment but merely that part of General Emmons' statement which is quoted, which is similar to the parts that Counsel for Petitioner is offering in evidence.

Mr. Anthony: Well, can we take the Respondent's case up when that is in order, your Honor?

The Court: What is the advantage of putting that in at this time? It would seem certainly appropriate to me if these other statements are to be put in of General Emmons. Of course, he had a direct responsibility here at the time he made the statements. And this relates to somewhere else besides the Hawaiian Islands. But it would seem appropriate to me that you could put that in as a part of your case, but hardly at this time to break into the Petitioner's case.

Mr. Ennis: Well, if your order indicates it is admissible, as these other statements are, why I am content to leave the offering [460] until later.

The Court: I see but little difference about it.

Mr. Anthony: At the same time I have no objection to having it go in right now.

The Court: I don't like to break the continuity of it in that way.

Mr. Ennis: Well, if Counsel states he has no objection to it, I will offer it later.

The Court: All right.

Mr. Anthony: I'll offer some more later, too. May that be given a number, please?

The Court: "N-5." What is the date?

The Clerk: May 27, 1943.

Mr. Anthony: A statement by the Secretary of the Navy, dated March 2, 1944. I am offering a quoted part, which is as follows:

> "We now go where we please in the Pacific and dare the enemy to come out and fight. We were out there challenging the Jap navy to come out and fight. And what did they do? Those ships which were in the vicinity turned and ran away."
>
> "* * * more than 50 aircraft carriers now are plowing the Pacific waters in search of the enemy."

That is by the Secretary of the Navy.

Mr. Ennis: No objection.

The Court: Received "N-6."

(Petitioner's Exhibits "N-1, N-2, N-3, N-4, N-5, N-6" received in evidence.)

PETITIONER'S EXHIBIT "N-1"

[Stamped]: ~~Jan 1 1943~~

Gen. Emmons Views Future With Confidence

By Lt. Gen. Delos Emmons, Military Governor and Commander of the Hawaiian Department

During the year which is now drawing to a close, all members of the armed forces—army, navy, ma-

rine corps and coast guard—and all elements of the civilian population have applied themselves industriously and wholeheartedly toward attaining the military security and safety of these islands.

The work has been difficult and has required the closest cooperation and coordination of all people here.

As we review the accomplishments of the year, it must be obvious to all that remarkable results have been accomplished.

By reason of the work which has been done, we are entitled to look forward with confidence and reassurance to the future.

I congratulate the people of the territory of Hawaii and all members of the armed services upon the zeal and spirit which they have displayed, and I take this occasion to extend to the entire population of the Territory my sincere and cordial greetings for the New Year, and to express the wish that they may continue in the future along the path they have so well outlined in the past.—Star-Bulletin.

[Stamped]: Jul 5 1943

Gen. Richardson Pays High Tribute

By Lt. Gen. Robert C. Richardson, Jr., Commanding General, Hawaiian Department

I am honored to have the opportunity of paying tribute today to the wardens' division of the office of civilian defense.

All the citizens of this territory share with me a deep pride in your organization.

Ever watchful over the skies, every ready to fight

incendiary bombs and fires, trained for defense against poison gas and in the use of chemicals, you are in reality just as much on a wartime basis as our soldiers, our sailors and our marines.

In case of an attack, on these islands, which is always a possibility, you will be obliged to serve under fire, when your efficiency and courage will be put to the test.

* * *

Today is the second birthday of your organization, which started in a very small way with the formation of a fire wardens' committee of the municipal major disaster council.

After Pearl Harbor the committee grew rapidly, suffered all the pangs of reorganization, and finally emerged as a defense unit of which any city might well be proud.

You comprise an able, efficient and patriotic group of citizens upon whom the territory must depend if attacked.

* * *

We should indeed be very thankful and grateful that time has permitted us to organize so formidably against attack, but one is never so well prepared that he can permit himself to rest on his oars and in the case of the Hawaiian islands we can not overlook the capabilities of our enemy, the Japanese, to strike at us again.

They are an astute, resourceful and relentless foe, and therefore we must never for one instant relax our alertness, nor our preoccupation with our defense.

Meanwhile, we are training our troops in offensive warfare as well as in defensive tactics.

I count upon you to uphold your present high standards because with your aid and with the aid of people like you who serve so willingly, so silently, and without ostentation, America can not fail to win this war.—Star-Bulletin.

[Endorsed]: Filed 4-6-44.

PETITIONER'S EXHIBIT "N-2"

[Stamped]: Jun 7 1943

Richardson Pays Tribute to Army-Navy-Civilian Unity

Star-Bulletin June 5, 1943

The text of his address follows:

"As I assume command of the Hawaiian Department I am impressed by the great development which has been accomplished in this area in the past 17 months.

"Under the able leadership of my predecessor, Lt. Gen. Delos C. Emmons, the Hawaiian islands have been transformed into a strongly organized outpost for the defense of the Western Hemisphere.

"This group of islands is now in a position to take care of any enemy who would be so rash as to attack it.

"The Hawaiian group is on guard, so to speak, for the entire Pacific coast of the United States, Canada, and our sister republics to the south, and as the war against the Japanese progresses these islands will be the base of the offensive drive against Japan.

Here Many Times

"It has been my good fortune to visit Hawaii many times during my service as an officer in the past 38 years, en route to and from the Philippines and more recently while on a mission a year ago throughout the South Pacific and Australia.

"The measures which have been taken in the past year to strengthen the defenses of these islands make of these islands a vastly different Hawaii today.

"Outwardly the change is not so noticeable, because nature—which has always been kind and generous to the islands—furnishes their best camouflage; but inwardly there has been a moral and spiritual change in the life of the people, who no longer take life in the Pacific for granted, but are acutely alert to their dangers and to their responsibilities.

"There is unusual unity between the civil population and the armed forces, both of which standing together are ready for any test to which they may be put. To the people at home, as well as to our fighting comrades all over the world I am glad to report from my new command that the state of the defenses of this outpost and of the training of the troops is good.

Civilian Workers Lauded

"It is gratifying and inspiring to feel the intensiveness of purpose displayed by our civilian war workers and by our soldiers in maintaining themselves in a state of readiness.

"There have been many necessary restrictions imposed on military and civilian personnel alike that have effected great changes in the daily lives of every man, woman and child on the islands; but these restrictions have been accepted in the finest spirit of cooperation, as everyone realizes that no chances can be taken in the defenses of Hawaii.

"The army, the navy, the marines and the coast guard are as one, and hand in hand with the civil government have created an atmosphere that is charged with an eagerness to get on with the war. There is a complete absence of complacency and a corresponding state of high morale.

Ideal Training Ground

"With their varied terrain, the Hawaiian islands offer an ideal place for extensive training in jungle and amphibious warfare and, taking advantage of those natural facilities, an intensive training in these types of warfare is in progress.

"Hawaii is the key to the Pacific and the key to the defenses of the western coast of the United States. There is certainly no doubt that Hawaii is one of the main approaches which our president declared will lead to Tokyo.

"Passing through here will be an ever increasing number of troops and an ever increasing amount of the machinery of war, all directed toward the very heart of the empire of Japan.

"On this day—the anniversary of the Battle of Midway—although we are much stronger than we were at that time, we are even more alert than ever.

"This anniversary will recall to every American

the sacrifices which have been made by our gallant comrades of the army, navy, marine corps and merchant marine who gave their lives for our country not only at Midway but in Guadalcanal, Tulagi, New Guinea, the Bismarck sea, Darwin, Africa, and Tunisia, and throughout the world.

"Our responsibility to these men is great. We will carry on to keep their memories alive for all time to come, and that they may know that their comrades who are left behind will never let them down."

[Endorsed]: Filed 4-6-44.

PETITIONER'S EXHIBIT "N-3"

* * *

The text of Admiral Nimitz' proclamation was as follows:

PROCLAMATION No. 1

To the People of the Marshall Islands:

In prosecuting their war against the Japanese it has become necessary for the armed forces of the United States under my command to occupy this and other islands of the Marshall islands.

It is the policy of the United States forces not to make war upon the civilian inhabitants of these islands but to permit them to continue their normal lives and occupations in a peaceable manner; so far as war necessities and their own behaviour permit.

In order to preserve law and order and provide

for the safety and welfare both of my forces and of yourselves, it is necessary to establish military government in the islands occupied by United States forces.

Therefore, I, C. W. Nimitz, Admiral, United States navy, commander in chief, United States Pacific fleet and Pacific ocean areas and military governor of the Marshall island areas occupied by United States forces, do hereby proclaim as follows:

I.

All powers of government and jurisdiction in the occupied territory and over the inhabitants therein, and final administrative responsibility, are vested in me as admiral, United States navy, commanding the United States forces of occupation, and military governor, and will be exercised through subordinate commanders by my direction.

II.

The exercise of the powers of the Emperor of Japan shall be suspended during the period of military occupation.

III.

All persons will obey promptly all orders given by me or under my authority; must not commit acts hostile to the United States forces under my command or in any way helpful to the Japanese; must not commit acts of violence or any act which may disturb public safety in any way.

IV.

Your existing personal and property rights will be respected and your existing laws and customs remain in force and effect, except to the extent that it is necessary for me in the exercise of my powers and duties to change them.

V.

Until further notice, United States dollar currency, overprinted "Hawaii" and United States coins will be legal tender in the occupied territory and all persons are warned against accepting or dealing in any other currency whatever, except as permitted under my orders.

VI.

So long as you remain peaceable and comply with the orders of the United States forces of occupation, you will be subject to no greater interference than is made necessary by war conditions, and may go about your normal occupations without fear.

VII.

Further proclamations and orders will be issued by me or under my authority from time to time. They will state what is required of you and what

you are forbidden to do and will be displayed at police stations and in your villages.

C. W. NIMITZ,
Admiral, United States Navy,
Commander in Chief,
United States Pacific Fleet and
Pacific Ocean Areas
Military Governor of the Marshall Islands.

Date: 31 January 1944.

Star-Bulletin 2-4-44.

[Endorsed]: Filed 4-6-44.

PETITIONER'S EXHIBIT N-4

GEN. RICHARDSON SAYS
HAWAII'S COOPERATION
IMPORTANT IN THE WAR

(Following is the text of the address by Lt. Gen. Robert C. Richardson Jr., commanding the Hawaiian department of the army, and military governor of the territory, at the quarterly luncheon meeting of the Honolulu Chamber of Commerce today.)

Jul 15 1943

It was with a great deal of hesitancy that I consented to address the chamber of commerce today. Not that I am not very appreciative of the honor you have done me as representative of the army, but because of my deep conviction that it is better

Petitioner's Exhibit N-4—(Continued)

for general officers to perform rather than predict. Like the old saw relative to children, they should be seen and not heard.

In time of peace our people are not interested very must in their army and navy and the public regard their generals and admirals with mingled feelings of curiosity and amusement.

Their opinions are rarely sought and their influence is negligible.

When the war comes, however, the story is different, and the people are suddenly interested in the men who are to lead the armed forces and safeguard the country, as what these leaders do and say often has a great impact on the life of the nation.

They are charged with great responsibilities, of which the greatest is to lead their troops successfully in battle.

"Who are these men," you ask yourselves quite naturally, "to whom we have given our fortunes and our sons so that they may save our civilization? What are they doing and what have they accomplished?"

* * *

'Where Do We Stand?'

This thought prompted me to try to summarize our position in the subject: "Where Do We Stand?"

Many men much more learned that I have explained the reasons why we are in this war. They all boil down to our determination to defend what

Petitioner's Exhibit N-4—(Continued)

we have which Germany and Japan threatened to take away from us.

Fundamentally, the basic reasons are economic, the truth of which can best be revealed by a simple statement made by a Roumanian officer to me some years ago.

OUR GROWTH. Time is rushing on so fast and so many events fill our lives that we are apt to forget how unprepared we were just three short years ago.

To appreciate where we stand today we must recapture where we stood only recently and cast a backward glance at the army's weakness.

In 1920 our regular army numbered 118,000 men only, just about enough to form one army corps, whereas today we have 15 corps, not to mention our armies, task forces, and services.

In 1940, 20 years later, we had 185,000 men of the regular army, supplemented by 120,000 national guard and a corps of 100,000 reserve officers, a derisory number to protect 130,000,000 people.

Only 12,000 regular officers were available to begin the great task of expansion.

Reaching 7,500,000 Mark

Today we are rapidly reaching 7,500,000, of which 2,000,000 are in the air corps, and simultaneously the navy, marines, and coast guard are growing to the respectable figure of 2,000,000, or an over-all figure of nearly 10 million men—one of the largest armed forces in the history of any nation.

Petitioner's Exhibit N-4—(Continued)

To an audience of this character it is unnecessary for me to dwell on the problems involved in this tremendous expansion—problems of food, shelter, construction, clothing, transportation, armament, and equipment, to mention a few.

Some of the problems seemed insurmountable, but the army, navy, business and industry, working together, gradually licked them to such a degree that the armed forces have been able to develop almost rythmically according to plan.

* * *

Shortly after the fall of France our leaders realized that our armed forces were dangerously weak and under the leadership of our president congress authorized calling into service the national guard in September, 1940, and passed the selective service act in October, 1940.

Canal Protected

Meanwhile, the president threw a protective chain around the Panama canal by the acquisition of bases in the Caribbean sea and in the Atlantic.

We were not yet at war, but as I look back upon those steps in preparedness it seems to me that the nation should be very grateful for the farsightedness of our leaders which gave the nation a running start when we were forced into the great conflict by the disaster at Pearl Harbor.

It is only necessary to compare our condition on December 7, 1941, upon entering the war, with that when we declared war in April, 1917.

Petitioner's Exhibit N-4—(Continued)

In World War I we started from scratch, whereas in World War II we were quite far ahead of the game.

But after Pearl Harbor the nation took a dive into the war and went to town on the preparedness of our army and navy.

* * *

Even though the war department had made many war plans for all eventualities no human being could have foreseen that the modern war would require so many different types of units and that it would be fought all over the world.

Under All Conditions

The character of the war soon showed that our organizations would have to be adapted to fighting in all climes and under all conditions and therefore the war department was required to develop not only divisions, with their attendant services, but new, strange units—tank corps, airborne divisions, parachute troops, antiaircraft regiments, dive bombers, fighters, heavy bombardment, machine guns, and antiaircraft armament of all calibers and vehicles galore of all types, sizes and shapes—new and strange.

When I see it all today and realize that it has been developed in two and one-half short years it seems that a miracle has taken place in our country.

There have been many miracles in the last two or three years, but I think that without doubt the greatest has been the transformation of our peacetime industry to total war production.

Petitioner's Exhibit N-4—(Continued)

But the mere possession of equipment and raw men by no means makes an army.

The training of these men within their new organizations was a very difficult problem; first, because our people fundamentally are opposed to what is known as armed discipline.

They are naturally afraid of regimentation or living a regulated life.

Followed Public Opinion

In the early days of the training of the army the leaders of the army were forced to follow public opinion, which seemed to insist that new men coming into the army should be treated almost gently.

We looked upon it as an age of pampering and coddling, and were dismayed and chagrined at the thought that perhaps Americans had become soft.

But we quickly found that the men themselves detested that attitude and with few exceptions welcomed the most Spartan discipline which has always characterized the army and without which long experience has taught us battles can not be won.

* * *

As illustrative of the effect of such coddling on our soldiers I recall an actual happening in connection with a sentry on guard.

As all of you know, whenever a strange person approaches a sentry post at night the sentry is required to challenge him in good resounding English, "Halt, who goes there?"

But in this early army we were developing the sen-

Petitioner's Exhibit N-4—(Continued)

try on duty, perhaps under the spell of the age of pampering, cried, "Halt, who is this please?"

It was not long, however, before our new army realized what was meant by the word "discipline."

Value of Discipline

They quickly found that it is disassociated entirely from punishment and is synonymous with good training. A disciplined soldier is a trained soldier. He observes law and order.

One of the most formidable problems which confronted the army was the training of officers.

Although we had 100,000 reserve officers, many of them were classed too old for combat duty and it was necessary to have recourse to officer candidate schools, in which most of our finest young officers have been developed.

* * *

The mere acquisition of the uniform has nothing to do with making an officer. He has to shed not only his civilian clothes but a certain mental attitude toward life.

He must divest himself largely of expediency and view his work in terms of what is best for the interests of the country.

That is much more difficult than it sounds. It is not until he gets the feel of being a member of a large fraternity which is working for an ideal that he can be characterized as an officer.

Petitioner's Exhibit N-4—(Continued)

Same Influence Necessary

To a lesser degree the same influence is necessary to make a soldier. Until a man has been in the service at least six months and absorbed the ethics of the army—which, after all, are very high—he is unhappy and feels that he is in an alien world.

But once he has acquired the feeling of being a member of a fraternity his whole outlook on the profession changes.

In this new army—which is your army—there has been achieved an amalgam of all the various components. The regular army, reserves, national guard have all been obliterated and now form one army—the army of the United States. In it is all the talent of our country. It represents a mosaic of habits, customs, thoughts of our great land.

Rubbing shoulders are the boy from the country and the boy from the city, the rich boy and the poor boy, the farmer and the college professor, the chemist, and the welder—all united by the same sense of duty.

Strength Is Felt

Speaking as a commander who has seen the army grow and who for the first two or three years felt its weakness, I can now say with conviction that I am beginning to feel its strength like the strength of a man who has been convalescing and who now feels the warm blood of health running through his veins and urging him to try his powers.

The army is now becoming seasoned and acquiring maturity and it represents today an institution

Petitioner's Exhibit N-4—(Continued)

which is full of virility and in which our American manhood is being reborn.

This great army which I have attempted to describe is fighting on battlefronts all over the world which do seem fantastic when the list is called. Guarding the Panama canal we have troops in the Bahamas, Cuba, Panama, Antigua, Santa Lucia, Trinidad, Curacao, British Guiana, Guatemala.

* * *

In the Atlantic further north we have them occupying the Bermudas, the North Atlantic, Newfoundland, Greenland, Iceland, Great Britain.

Farther south, Africa and Islam, North Africa, and now Pantelleria, Lampedusa, Sicily.

Again we have them in Trans-North Africa, West Africa, Eritrea, Egypt, Iraq, Iran, Indo-China, India, Burma, China. Again in the southwest Pacific, Australia, New Guinea, Woodlark, Trobriand islands, Solomons, Fijis, Tahiti and other islands too numerous to mention, all looking toward Hawaii as their supporting base.

World Strategy

The world strategy decided upon by the leaders has necissitated the occupation of all these islands by our troops. It is no secret that our compass has been set to defeat Germany and Italy first.

Europe is being encircled by a great steel ring and I do not mean a Nibelungen ring. We are now on the perimeter, slowly closing the ring around the continent.

Petitioner's Exhibit N-4—(Continued)

When that has been accomplished and Germany and Italy fall, the weight of the United Nations will be turned to the Pacific.

* * *

In the meantime the Pacific has undergone in the last few months an extraordinary development. Without mentioning any names of islands, this whole great area is a series of magnificent bases from which our aircraft can operate and which form a great line of communications to Australia.

From a trickle of planes which passed through here one years ago a stream has developed, and we are looking forward to the not too distant future when that stream will become a torrent.

At the present moment the offensive has been grabbed by us from the Japanese and instead of being on the receiving end we are now on the giving end and are hammering at the defensive perimeter. Slowly but surely the center of gravity of operations is moving north and northwest toward Japan, with the idea of depriving her of her airbases.

Not Basis of Judgment

In this area your interests naturally are centered on the war against Japan.

Many of you in this audience know the Japanese profoundly, but your association with them in Hawaii does not furnish a basis to judge them on the field of battle.

From all the reports that have reached me they

Petitioner's Exhibit N-4—(Continued)

are a resolute, resourceful, determined and cruel enemy.

They are relentless and indoctrinated with military arder to the point of fanactism.

Their psychology has been determined by years of indoctrination that the soldier represents the highest expression of man's occupational life.

Nearly all of the nations throughout history have rather despised their soldiers and looked upon them as mercenaries.

But the Japanese have always extolled the armed forces.

* * *

Proverbs Show Attitude

Although the Chinese are emerging from their former contempt of soldiers, a reading of their early proverbs gives an insight into their attitude.

As they formerly said, "Good iron is not for nails nor good men for soldiers." Or again, "It is better to have no son than one who is a soldier."

Even the Germans who today extol their soldiers, said, "Soldiers deserve to be well paid and well hanged."

And the French, who have always looked down on the professional soldier, remarked "Old soldier, old idiot."

And even the Russians, in their proverbs, speak contemptiously: "Flog two to death and train one."

But the Japanese say, "Among flowers the best is the cherry blossom; among men the best is the soldier."

Petitioner's Exhibit N-4—(Continued)

It is that psychology that makes the Japanese soldier a formidable foe.

With the increased tempo of the war in this area, Hawaii becomes more important than ever as a great base and a support of future operations against the Japanese.

* * *

Must Remain on Alert

We must not, however, allow ourselves to become overconfident or feel that we can be less alert because we read in the papers that our navy has sunk four more warships or that our army has taken a few more island bases.

The people here must realize and understand that they are in a war zone, where anything can happen, any day, at any time.

Our enemy is resourceful and in my judgment will leave no stone unturned to humiliate us even at great sacrifice to himself and he would be willing to risk a great deal and gamble with his assets if he could inflict destruction upon even a part of these islands.

The location, therefore, of the islands in the war zone has subjected the people of this territory to military law, which is nothing else than the law of necessity.

I realize that it is natural for civilians, who are not accustomed to any control by the military, to chafe under military law, but let me put it before you in this light: Is it better to satisfy one's personal feelings and do without military law than to

Petitioner's Exhibit X-4—(Continued)

live in the knowledge that it is done for the safety of our country?

* * *

Weight Personal Desires

At a time like this it is essential that every citizen weigh his personal desires, his business profits, his decisions, all in terms of the interest of our country.

The people of the territory have been most patriotic in acquiescing to martial law, and have supported the general orders in a manner that calls for great praise.

Last March there were returned to the civil authorities many of their normal functions, but it was found necessary to retain under the control of the military governnor the labor engaged upon army and navy contracts and certain public utilities and the stevedores.

This labor is as vital to the success of our armed forces as are the soldiers and sailors.

War is not waged by men in uniform alone. They can do nothing unless backed by civilian labor.

Therefore, I regard this labor as an integral part of our team and I wish to take this opportunity of paying great tribute to the men and women who are working so cheerfully and so helpfully upon all of our projects.

Justice For Labor

Labor can rest assured that the military authorities are just as much interested in their welfare and in seeing that justice is done them as they are in the welfare of the soldiers and sailors.

Petitioner's Exhibit X-4—(Continued)

It was because of this great cooperative spirit existing among the people of the islands, coupled with the seizure of the offensive in the Pacific by our armed forces, that I feel justified in easing up on the hardships of the blackout.

* * *

I feel confident that together we can work out this problem so that life will be more pleasant and more bearable without relaxing in any degree our alertness and the regulations for our security.

But we must all work together. As I have said before, one man can do very little, but together we can do a lot.

Contribution to Defense

In this connection I should like to leave the thought that whatever is done should be viewed as a contribution to our country's defense and not as something done as a favor to institutions called the army or the navy.

Those institutions are YOUR institutions. You PAY for them and they belong to you.

They are composed of your fathers, your sons, and your brothers and you should never refer to them as THE army or THE navy but you should now refer to them as OUR army and OUR navy.

The cooperation which has existed in this community has been splendid—by business, by industry, by professions, and by labor, and with this continued cooperation we can beat the Japanese and save our civilization.

* * *

Petitioner's Exhibit N-4—(Continued)

Americans should be willing to sacrifice for America. We owe so much to our great country, which has been so generous to each and every one of us.

We should be willing to sacrifice to preserve the character of our people and our civilization.

Americans Most Generous

Of all the people that I have seen I say without hesitation that as a nation we are the most generous, the most tolerant, the most understanding, the most unselfish, the most Christian in outlook. Those are our good qualities.

But we have some very poor qualities which I am afraid have already done us harm and will do us greater harm in the future unless we correct them.

As a race we are naive, a little gullible, and we do not think far enough in the future.

Life has been good and kind to us and we have not been forced to give too much attention to the destiny of our country.

The experiences, however, which our men are having in this war should be a liberal education and at the same time a sobering influence. They are living in an atmosphere of morality and moral principles, and I hope that their experience will cause them to reaffirm their faith.

When the war is over I hope that we can utilize the army as a great school of citizenship. You can call it universal military training, if you wish, but my idea goes beyond the purely military develop-

Petitioner's Exhibit N-4—(Continued)

ment and encompasses a field in which our men giving a year's service in the army are taught the history of our country and the best means of preserving our democratic principles.

There is no militarism whatsoever in the American army and I hope that there never will be.

We must study our problem and be ready and devolve a plan not for today but for the next generation.

Star-Bulletin

[Endorsed]: Filed 4-6-44.

PETITIONER'S EXHIBIT N-5

Gen. Richardson To Take Command Here

—

Replaces Gen. Emmons Who Goes to Duty At Another Post

—

[Stamped]: May 27 1943

[Marginal note]: Star-Bulletin

At his final press conference in the "little White House" in Iolani palace grounds this afternoon, Lt. Gen. Delos C. Emmons, commanding the Hawaiian department and military governor, announced he is leaving for a new command.

As his successor, he announced Maj. Gen. Robert C. Richardson Jr., who will take over in a few days.

Gen. Emmons said he has "a slight idea where his

new command will be but that it is confidential at the moment."

Gen. Richardson attended the conference and was introduced to correspondent Maj. Harry Albright of the Hawaiian department public relations office.

In opening the conference, Gen. Emmons said:

"I wish to thank members of the press for their sympathy, cooperation and understanding during my stay in Hawaii.

"Then I want to introduce my successor, Gen. Richardson, and I want him introduced personally to all the correspondents present. He will take over in a few days.

"I have an aloha message for all of you," he said.

Aloha Message

His aloha message follows:

"People of Hawaii: Seventeen months have now passed since that fateful day in December, 1941, when war came suddenly to our country in direct violation of the protestations of the attacker.

"On December 17, 1941, by direction of the President, I arrived and assumed command of the Hawaiian department, and became the military governor of the territory.

"It is now with sincere regret that I announce my departure from Hawaii to another area, the location of which I may not as yet disclose.

"My tour of duty has given me the privilege of leading troops of all arms and of associating on an intimate basis with many officers and men of the navy and the marine corps.

Pleasant Experience

"As the executive head of the government under martial rule, I have dealt with many hundreds of civilians of all classes.

"Viewing the past year and a half in retrospect, it is the most pleasant experience I have ever had.

"Many factors have contributed to that result, but mention may be made of only a few in particular.

"The officers and men of the Hawaiian department are entitled and have my sincere appreciation and gratitude.

"They have given me their loyal support and untiring efforts and their consistent cooperation.

"I know that by reason of their training, physical fitness, equipment and fine leadership they are ready to fight as ably and courageously as any similar group in our army.

Thanks to Navy

"The great naval installations on Oahu required the presence here of a large contingent of naval, marine and coast guard personnel."

"I desire publicly to express to Admiral Nimitz and to the splendid officers and men of the navy and its allied services my thanks for their assistance and cooperation during the period of military rule in the territory.

"Our sister service in this war as always is proving itself worthy of leave taking the tremendous it.

"I can not overlook at this time of all the fine

tradition peculiar to amount of work which has been done by the women of this community in the past 17 months.

Praise for Women

"Many hundreds of women have done emergency work—oftentimes difficult and strenuous—to provide needed hospital facilities, office assistance, clerical work and recreation, for the members of the armed forces.

"These women have earned the gratitude of the men who have benefited by their generous and willing efforts.

"The task of building fortifications, airfields, roads and military installations has been immense.

"We asked and received the services of thousands of men, in-

"Our sister service in this war as always is proving itself worthy of leave taking the tremendous it.

"I can not overlook at this time of all the fine tradition peculiar to amount of work which has been done by the women of this community in the past 17 months.

Praise for Women

"Many hundreds of women have done emergency work—oftentimes difficult and strenuous—to provide needed hospital facilities—office assistance, clerical work and recreation, for the members of the armed forces.

"These women have earned the gratitude of the men who have benefited by their generous and willing efforts.

"The task of building fortifications, airfields, roads and military installations has been immense.

"We asked and received the services of thousands of men, including those essential to plantation operation, to do these jobs.

"Speed was one of the prime essentials in order to attain a reasonable military security for the islands at the earliest possible date.

"Civilian war workers have completed many of their projects ahead of schedule.

In Splendid Fashion

"In giving you my aloha may I say that you have conducted yourselves in this emergency in our country's life in a splendid fashion.

"My task was a difficult one in many ways. It would have been doubly so had it not been for the wholehearted support and cooperation of former Governor Poindexter, Governor Stainback and all of the federal and civil officials and the public as a whole.

"The people of Hawaii have set an example for the nation to follow. To them I express my deep appreciation for their confidence and the hope that I have not failed them.

"I wish for you all—soldiers, sailors, marines and civilians—the best of everything in life.

"May the time soon come when these delightful islands may once more enjoy a peaceful routine of life, undisturbed by the threat of aggression from a ruthless, lawless and godless enemy."

In the transfer to new duties, it is believed here that the outstanding record that Gen. Emmons has made as commanding officer of the Hawaiian department is recognized.

It is indicated also that the special work of preparing Hawaii against imminent danger of attack, on which the selection of Gen. Emmons was partly made just after the "blitz" of December 7, 1941, has been largely completed.

West Point Graduate

Gen. Richardson was born October 27, 1882, in Charleston, S. C. He is now 61 years old.

He attended the College of Charleston from 1898 to 1900. In 1904 he was graduated with a B.S. degree from West Point.

In 1905 he saw action as a lieutenant against the Moros in the Philippines. He was given the Silver Star decoration for gallantry in the campaign.

From 1906 to 1911 he was an assistant instructor in modern languages at West Point.

He left the academy for duty with the 23rd infantry regiment in Texas until 1914. He returned to West Point to become an assistant professor in English from 1914 to 1916.

In 1916 he married Lois Elbertine Farman. They have a son, Robert Charlwood III.

During World War I he served as a liaison officer in the AEF and held the rank of lieutenant colonel. As a result of this, he was awarded the Distinguished Service Medal for notable military attainments with the AEF in France.

Attended Peace Parley

After the war he was with the 3rd army of occupation at Coblenz, Germany. He was on the reparations board in France and attended the peace commission in Paris.

Gen. Richardson was graduated from the French war college and was appointed military attache at the U. S. embassy in Rome, where he became acquainted with Mussolini.

He has held many important army posts in his military career. He was commandant at West Point, commander of the 5th cavalry at Ft. Clark, Tex., commander of the 1st cavalry division at Ft. Bliss, Tex., commander of the cavalry school at Ft. Riley, Kan., and, in 1941, he was director of the public relations bureau of the war department.

Many Decorations

Gen. Richardson has been awarded the following decorations:

Distinguished Service medal, Allies victory medal with three stars, Purple Heart, Silver Star (U.S.); Croix de Guerre with palm, Officer Legion of Honor (France); Order of Leopold, (Belgium); Officer Order of St. Mauritzio and St. Lazarus (Italy); and Officer La Solidaridad (Panama).

Gen. Richardson also wrote a book, West Point—An intimate Picture of the National Academy.

He is a member of the Ends of the Earth club, New York; Army and Navy club, Washington and Manila, and the Army & Navy Country club, Arlington, Va.

He is a member of the Episcopal church.

From West Virginia

Gen. Emmons was born January 17, 1888, in Huntington, W. Va.

Upon graduation from West Point in 1908 he was appointed a second lieutenant of infantry.

His services prior to the World war included duty with the infantry troops at the Presidio, San Francisco, Cal.; at Ft. Gibbon, Alaska; at Plattsburg barracks, N. Y., and on the Mexican border during frontier disturbances of 1916-17.

Shortly after the entrance of the United States into the World war, he was detailed with the aviation

[Endorsed]: Filed 4-6-44.

PETITIONER'S EXHIBIT N-6

Frank Knox Calls Japanese Cowards

Chicago, April 1 (UP) — Secretary of Navy Frank Knox Friday called the Japanese cowards, saying that "we now go where we please in the Pacific and dare the enemy to come out and fight."

Referring to the attack on the Palau Islands as an example of how the Navy has seized the initiative in the Pacific, Knox said:

"We were out there challenging the Jap navy to come out and fight. And what did they do? Those ships which were in the vicinity turned and ran away."

Addressing a meeting of businessmen, Knox revealed that "more than 50 aircraft carriers now are plowing the Pacific waters in search of the enemy.

[Marginal note]: Advertiser 4-2-44

[Endorsed]: Filed 4-6-44.

Mr. Anthony: Mr. Marshal, will you please call Mr. Melville. [461]

DAVID G. MELVILLE,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. What is your name?

A. David G. Melville.

Q. What is your occupation?

A. Quarterman shipfitter, Pearl Harbor.

Q. How long have you held that position?

A. Since March, 1942.

Q. How long have you worked down there at the Navy Yard? A. Since——

Q. Approximately?

A. Since the first of May, 1934.

Q. Did you work there continually?

A. With exception of six months when there was lack of work.

(Testimony of David G. Melville.)

Q. You are from the mainland, are you, Mr. Melville? A. Yes, sir.

Q. What state? A. Massachusetts.

Q. Born in Massachusetts?

A. Born in Rhode Island, westerly Rhode Island.

Q. Mr. Melville, you work on the graveyard shift there in the yard? A. Yes, sir.

Q. Do you know Duncan here in the Courtroom?

[462]

A. Yes, sir.

Q. Is he one of your men?

A. Yes, he works under me.

Q. Did you happen to see him on the evening of February 24th before you went to work?

A. Yes, sir.

Q. How did you go to work?

A. In my automobile.

Q. Did you have anybody with you?

A. Yes, sir.

Q. Who was with you?

A. A man by the name of Rhinehart and a man by the name of Mernick.

Q. Will you please tell the Court what you observed on that evening in connection with Mr. Duncan?

Mr. Ennis: If the Court please, I'd like to renew my objection to this line of examination. It is the same objection I made with respect to the witnesses who were attached to the ship; and would

(Testimony of David G. Melville.)

it be satisfactory to your Honor to take it subject to the motion to strike it later?

The Court: Well, I can't foresee where we are going, what the idea is, but I will receive it with that provision.

Mr. Ennis: As I take it, your Honor, there is no claim that Mr. Melville's testimony has to be perpetuated now because he is leaving the Territory?

Mr. Anthony: There is no such claim. [463]

Mr. Ennis: But I will take it, subject to objection, if I may.

The Court: All right, with that understanding, it is received.

Q. Did you get the question, now? Tell the Court what you observed on that occasion?

A. Well, going, making the entrance to the Navy Yard, you have to go very slow in driving through there, and if there are several cars ahead of you you just stop and wait. And this night one of the boys in my car said, "Well, there's one of your boys there." I said, "Yes, he must have forgot his badge."

Q. Whom were you referring to?

A. To Duncan.

Q. Where was Duncan?

A. He was standing over on the walk. There's a walk for pedestrians on the righthand side entering the Navy Yard, right next to the lane where the cars go in, I should say 10 to 12 feet away.

Q. Did you stop your car?

(Testimony of David G. Melville.)

A. Yes, sir. I was stopped right there at the time, and while I was stopped the marine pushed Duncan's arm and then Duncan pushed his arm back. And then there was another marine came right up at that time and said, "You're under arrest." And as soon as he said "You're under arrest," Duncan immediately walked over and sat down on the bench.

Q. Did you see anybody strike anybody else at that time?

A. No, sir, I saw no blows whatever.

Q. Did you see anybody kick anybody? [464]

A. No, sir, I did not.

Q. Were you close to the scene of this incident?

A. Yes, sir, as I say, within 10 or 12 feet.

Q. How long were you there?

A. Oh, three or four minutes, because there was some kind of a hold-up there ahead of us—I don't know just what it was.

Q. Were there a number of marines there at that time?

A. From six to eight. There always is around there as you enter the yard, there's marines—well, I think there's four passageways there, but at night they only open two, and there's marines on the other side for the cars to come to town, coming through the gate; there's a marine stationed there, and a marine here to check the cars of persons going, entering into the area.

Q. Did Duncan have his badge on when you saw him?

(Testimony of David G. Melville.)

A. I couldn't say anything about that, sir.

Q. But he was standing up on this walk?

A. Yes, sir.

Q. And you're quite sure that no blows were struck while you were there?

A. No, sir, there were no blows struck while I was there.

Q. Did either marine or Duncan look as though they had been in a fight?

A. No. As I say, the first thing that entered my mind was that he had forgotten his badge, and I was going to find a parking space to see if I could identify him. That was my first thought. And after they placed him under arrest and he had taken his place [465] on the seat, I thought I might as well go along to the shop.

Mr. Anthony: That's all.

Cross-Examination

By Mr. Ennis:

Q. Was Duncan talking to the marines when you first saw him?

A. Yes, there was some kind of an argument there. I won't say just what it was.

Q. And the argument apparently had been going on when you first noticed it? A. That's right.

Q. So, of course, you don't know whether there was any struggle or any blows struck?

A. No, sir, not while I was there, there was none.

Q. How far away were you?

(Testimony of David G. Melville.)

A. From around 10 or 12 feet.

Q. You were sitting in your car?

A. Yes, sir, with the windows all open.

Mr. Ennis: That's all. Thank you.

Mr. Anthony: Thank you, Mr. Melville.

(Witness excused.)

Mr. Anthony: If the Court please, at this time I am prepared to rest, with the exception that I would like to state to the Court that Mr. Ennis and myself have arranged that, if it is convenient to the Court, Governor Stainback testify tomorrow morning at nine o'clock. I would also like to have the opportunity to review and [466] tend again to your Honor some of these clippings which thus far Counsel has objected to. With that statement, I am prepared to close my case now, if I may have that permission. And also I would like it understood that we would still like the information from the Court's direct request, in regard to the date when the last attack on shipping between here and the coast occurred, if that can be disclosed.

Mr. Ennis: If the Court please, we are taking up the last item with the military authorities.

The Court: Well, if it is claimed that there is any reason why that shouldn't be disclosed——

Mr. Ennis: We will advise your Honor. And if it is agreeable to your Honor, subject to the two matters on which the Petitioner wishes to proceed—the newspaper clippings and the Governor's testimony—why we'd be prepared to go on now, your Honor, with the Respondent's testimony. We have

some witnesses here. We might be able to dispose of them quickly.

The Court: Could you give the Court any estimate, rough or otherwise, as to about how much time your case will require?

Mr. Ennis: Well, if your Honor please—pardon me for just a minute, I think I can.

The Court: Yes.

Mr. Ennis: Is it your Honor's practice to hold Court on Saturday?

The Court: Well, I have already set a case for this coming Saturday. Yes, it has been the practice here, at least since the [467] beginning of the war, not to differentiate between Saturdays and other days of the week.

Mr. Ennis: Well, if Saturday is already occupied——

The Court: Yes.

Mr. Ennis: ——I would say that the Government would finish Monday.

The Court: The principal reason why I am making the inquiry is on account of the reporter's service. That problem is with us all the time. We just had a Grand Jury report and there were a number of indictments made, and there is the matter of setting the arraignments Normally it would be either Saturday or Monday. And I was wondering if we would likely get through with this case this week as to the taking of evidence at least. I could arrange to put over the case that is set for Saturday if there was a fair chance of getting through by this week working in the forenoon only.

Tomorrow afternoon I have another matter, so that I can't hold over the session conveniently tomorrow, but I could Saturday morning.

Mr. Ennis: If the Court please, the witness or two which the Government has, we will not be able to get them on Saturday. It would be physically impossible. But we would be willing to go through tomorrow if we might then finish up on Monday.

The Court: I can put the arraignments over until Tuesday if I know in advance and sufficient reasonable time is given so as to give adequate notice to the persons concerned. If you could bring your witnesses Monday, we would then finish the matter of taking evidence. [468]

Mr. Ennis: Oh, yes, we could finish taking evidence.

The Court: Then we could have arraignments set for Tuesday. They have already been set for Monday morning at 10 o'clock, but I could have them postponed one day more. If there is to be a postponement there, I would like to know it now so that I could get early notice to them and to their attorneys.

Mr. Ennis: Well, in order that your Honor's calendar might not be disturbed, it might be safer for us to go on tomorrow and then go over until Tuesday to be sure.

The Court: Well, if that's agreeable to you gentlemen and Counsel for the Petitioner.

Mr. Anthony: Whatever is agreeable to the Government and to the Court.

The Court: All right, then. Do you want to put a witness on now?

Mr. Ennis: Yes.

The Court: All right, call the witness. Following these other exhbits of a similar general nature, it seems to me to be timely to offer yours, but I don't make any special point of that. I'm speaking about these newspaper clippings. However, that's up to you to select the time for them.

ALICE CAMPBELL THOMPSON,

a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Mrs. Thompson, will you state your full name and your [469] present occupation?

A. Alice Campbell Thompson. I am now recorder in the Provost Court at the Pearl Harbor Navy Yard.

Q. What are your duties as recorder?

A. Taking down in shorthand and transcribing the testimony of every trial that's taken there.

Q. How long have you occupied that position?

A. Since October 27, 1943.

Q. Do you do that work every working day?

A. Yes.

Q. For several hours?

A. Yes, as long as Court lasts.

(Testimony of Alice Campbell Thompson.)

Q. You are a legal stenographer also?

A. Yes, I am.

Q. How long have you been in that work?

A. Why, I was employed by the law firm of Postal & Peters in Columbus, Ohio. I started in their employ in September, 1933, and I worked there continually since that time until the middle part of May, 1943.

Q. And then what employment did you take up?

A. And then I left to come over here, and I came over under a war service contract in the Navy and started to work for the Navy.

Q. And what position did you occupy before you became the recorder of the Provost Court last October?

A. I was Secretary to Lieutenant Ridley in the Discipline [470] Section of the Navy Yard.

Q. Were you recorder at the Provost Court at Pearl Harbor on the dates of March 1st and March 2nd, 1944? A. Yes, I was.

Q. Did the Petitioner, the boy Duncan, appear before the Provost Court on those two days?

A. Yes, he did.

Q. Did you make shorthand notes of the testimony on those two days? A. Yes, I did.

Q. Did you transcribe the testimony on the first day? A. No, I didn't transcribe that.

Q. Have you got the notes of that testimony with you? A. Yes, I have.

Q. Will you read your notes of that testimony?

A. This case is 650-44. "Are you Lloyd Clifford

(Testimony of Alice Campbell Thompson.)

Duncan? Answer. Yes, sir." And then he was arraigned by the Prosecutor.

Mr. Anthony: Was that you reading from your notes?

The Witness: Well, the witness was duly arraigned.

Mr. Ennis: Just read your notes.

Mr. Anthony: Sorry, I can't hear the witness.

Mr. Ennis: Speak loudly, Mrs. Thompson, and at first just read your notes, and if we want to ask you anything else about what happened, I'll ask you separately.

"Q. Do you understand the nature of the charge?

"A. Yes, I do. [471]

"Q. How do you plead, guilty or not guilty?

"A. Not guilty.

"Q. Have you any other witnesses?" This is the Court.

"A. Two mainland friends of mine. Their ship has left now."

Mr. Anthony: Just a minute. The witness said, "This is the Court." Does that appear in your notes?

The Witness: Well, I have the Court noted, that the Court is speaking.

Mr. Anthony: I'm sorry.

The Witness: (Continuing):

"Q. You have the right to be represented by an Attorney if you wish.

"A. I don't think I need an Attorney.

"Q. Are you ready to proceed at this time?

(Testimony of Alice Campbell Thompson.)

"A. I am.

"The two witnesses for the Prosecution were not present, so the case was continued until March 2nd, 1944, at 8:30."

That's all.

By Mr. Ennis:

Q. Did you also take the testimony of the hearing on the following day, March 2nd, 1944?

A. Yes.

Mr. Ennis: May I have that marked as Government's Exhibit 1 for identification? [472]

Q. I show you Respondent's Exhibit No. 1 for identification, dated March 2, 1944. (Showing witness a typewritten document) Have you seen it before?

A. Well, this is the copy that I typed from my notes.

Q. Is this the original, the original copy or the original which you transcribed from your notes of the hearing on March 2, 1944? A. Yes.

Q. Will you examine it and examine your notes? You have your notes for that day with you?

A. Yes.

Q. And examine this transcript which is the original typed from the notes, and tell the Court whether or not it is a correct transcript of your notes?

A. Do you mean to compare everything?

Q. Well, have you compared it before?

A. Yes, I have.

Q. You have compared it? A. Yes.

(Testimony of Alice Campbell Thompson.)

Q. And is it a correct transcript of your notes?

A. This is a true and accurate transcript of my shorthand notes from the beginning of the trial until the finish.

Mr. Anthony: May I have that last answer?

(The Reporter read the last answer.) [473]

Q. Did you take down in your notes and did you transcribe into Exhibit 1 all that was said by the witnesses and by the Petitioner during the trial on March 2nd? A. Yes, I did.

Q. And it all appears here? A. Yes.

Mr. Ennis: I offer Respondent's Exhibit No. 1 for identification in evidence.

Mr. Anthony: No objection, your Honor.

The Court: Let it be marked for identification.

The Clerk: Admitted in evidence.

The Court: No, marked for identification.

(Received and marked Respondent's Exhibit "No. 1" for identification.)

Mr. Ennis: That's all, Mrs. Thompson.

Cross-Examination

By Mr. Anthony:

Q. Mrs. Thompson, at the beginning of a hearing in the Provost Court, what happens? Just tell the Court what happens? How do you take your place? Just how does it work?

A. Well, the Judge enters the Courtroom first, and then I usually go after him, and the Prosecutor and the Clerk come in, and the Bailiff tells the Court to rise.

(Testimony of Alice Campbell Thompson.)

Q. I'm sorry, you're going to have to speak louder.

A. The Bailiff then asks the Court to rise, and they all stand, and when we get to our places, why he says "Be seated", and [474] we all sit down.

Q. Do you stand, too?

A. Yes, until he says "Be seated."

Q. And then what happens?

A. And then the Prosecutor goes on with the cases.

Q. What's the first thing that is said after the Judge sits down on the bench?

A. Why there isn't—he doesn't say anything. The Prosecutor just goes ahead with the cases and offers the cases and gives them to the Bailiff to call out.

Q. Now, I want the first thing that happens. Now, you've got a case for trial. What's the first thing that happens when the trial begins. Everybody is seated and have been given the order to sit down. Now what happens?

A. Well, the Prosecutor asks the Judge if he is ready to proceed.

Q. Does he stand up and ask the Judge that?

A. Yes, he is standing all the time.

Q. The Prosecutor asks the Judge What?

A. That he is ready to proceed with the cases.

Q. What does the Judge do?

A. He says, "We are ready."

Q. Then what happens?

A. Then the Prosecutor goes on with the cases

(Testimony of Alice Campbell Thompson.)

and he gives them to the Bailiff, and the Bailiff calls out the cases in their order, and we have each one in order. [475]

Q. Now, turn to your March 1st notes, will you please? What's the first thing that you have there?

A. Well, this wasn't the first case that was called that day. This is case No. 650.

Q. What's the first thing that you have there on that day?

A. Well, the first thing that I have is the number of the case.

The Court: What?

A. You mean the previous cases?

Q. Yes, after you got into the Courtroom, the first note that you took down after you got into the Courtroom?

A. Why, I don't take any notes until the defendants are called up before the Judge, and then when the Prosecutor begins why I take down everything from there on.

Q. You don't take anything like the calling of the case or conversation that goes on before the case is called or tried?

A. No, not until the defendant is called before the Judge, and then the Prosecutor begins and then I start taking down from there on.

Q. I see. Let's read, let's hear what you have about these other cases that were tried on that day.

A. Why, I have, the first case was No. 649.

Q. Read it.

A. "Are you Richard Cho? The Witness an-

(Testimony of Alice Campbell Thompson.)

swers. Case No. 649-44." And I have in my notes——

Q. Start from the beginning. I didn't hear your first [476] statement.

A. The first case was 649-44. And, "Are you Richard Cho?" "Witness duly arraigned."

Q. What do you mean by that? Who said that?

A. I don't take down the charge when the Prosecutor reads it. I just put down he was duly arraigned.

Q. I see. All right.

A. And then, "Do you understand the nature of the charge?" "Yes, sir." "How do you plead, guilty or not guilty?" "Guilty."

Q. Is that all you have? What happened to him?

A. This—well, I don't take down any notes if a defendant pleads guilty. I don't have to.

Q. What else have you got on that day?

A. I have what he was given, the fine that he was given.

Q. Well, what I'm asking you is to read from that notebook on that day what you have.

A. Then I have another number.

Q. No, I mean the one right following this Chinaman. A. This is it.

Q. All right.

A. "P.H. No. 646-44." This is Bellino. The Prosecutor reads the charge to him. He said, "Do you understand the nature of the charge?" And he said, "Yes." "How do you plead, guilty or not guilty?" "Guilty."

(Testimony of Alice Campbell Thompson.)

Q. What else do you have there?

A. And that's all I have. [477]

Q. All right, what the next case?

A. The next case was Duncan, No. 650.

Q. Start in with the beginning of that. What does that say?

A. "Q. Are you Lloyd Clifford Duncan?

"A. Yes, sir." —Then I have

"Witness duly arraigned."

"Q. Do you understand the nature of the charge?

"A. Yes, I do.

"Q. How do you plead to this charge, guilty or not guilty? "A. Not guilty.

"Q. Have you any witnesses?" This is the Judge Speaking.

"A. Two mainland friends of mine. Their ship has left now.

"Q. You have the right to be represented by an Attorney.

"A. I don't need an Attorney.

"Q. Are you ready to proceed at this time?

"A. I am."

Q. That was on March 1st? A. Yes.

Q. What else do you have?

A. And then I have just made a notation here that the two witnesses for the Prosecution were not present; the case was continued until March 2, 1944, at 8:30.

Q. Wasn't anything said by anybody there about that at all— [478] the Judge or the Prosecutor said nothing at all on the first day?

(Testimony of Alice Campbell Thompson.)

A. Well, that's all that I took down.

Q. He did say something?

A. I couldn't say. I don't remember.

Q. It seems a little strange that you're trying a case and you've got the Judge and Prosecutor and the Defendant, and neither the Judge nor the Prosecutor said anything on the day of the trial, doesn't it?

A. Well, there was a discussion of whether the Prosecution's witnesses were there, and they were not there, so the Judge said "This case is continued until March 2nd."

Q. But you didn't put that in your notes?

A. Well, I just made a notation of that.

Q. Now, turn to your notes of March 2nd. How did the opening gun start there on that day? What was the first case?

A. Well, I didn't make a notation of the dates. I couldn't tell you just what cases we had previous to that.

Mr. Anthony: Read the answer, please, Mr. Reporter.

(The Reporter read the last answer.)

Q. How many cases did you try the day you tried Duncan?

A. We had two one continued case and one case, No. 652, by the name of Vandermar, the defendant.

Q. You were there the whole day of that session, weren't you, the whole morning?

A. Yes, yes, I was.

Q. What time did you start in? [479]

(Testimony of Alice Campbell Thompson.)

A. At 8:30.

Q. What time was it over?

A. I don't remember.

Q. I can't hear you.

A. I don't remember.

Q. You have no idea when it was over?

A. No, I didn't make a notation of that.

Q. What's the first case that was tried on that day?

A. Well, the first case that I have is a case of——

Q. That isn't what I asked you. What's the first case that was tried that day?

A. Well, as I said, I didn't—the first case that I have in this notebook is the case No. 648 of Gonzales.

Q. What do you have about that?

A. This case is continued from another book.

Q. Well, can you read what you've got about it?

A. "A $10.00 fine."

Q. Is that all you have, "A $10.00 fine"?

A. Yes.

Q. And the number of the case?

A. Yes, it's continued from another book, and I don't have it.

Q. What's the next case after a $10.00 fine?

A. The next case is No. 652 of Vandermar.

Q. Of what?

A. By the name of Vandermar, the defendant.

[480]

Q. Let's hear what you have about that?

A. After the defendant was duly arraigned:

(Testimony of Alice Campbell Thompson.)

"Q. Do you understand the nature of the charge? "A. I do.

"Q. How do you plead to this charge, guilty or not guilty? "A. Guilty."

Q. Anything else?

A. That's all. And then I have the fine that he was given.

Q. Well, read what you've got?

A. "A $5.00 fine."

Q. What the next case that you've got?

A. The next case is the case of Duncan.

Q. Well, it's been testified in this Court that there were three cases tried before Duncan was tried on March 2nd. You have no record of that?

A. Well, there may have been. I don't have that notebook with me. I'm beginning with the continued case in here.

Q. You've got the notebook with you that's supposed to contain notes of what took place on March 2nd, have you not?

A. I have the notebook of the trial of Lloyd Clifford Duncan. I didn't think you wanted——

Q. Did you need a special book for Duncan?

A. No, this is just a continued book.

Q. Well, these other cases that you tried, where would they be, in what book, on that same day?

[481]

A. Well, they are in a book that I have in my files.

Q. How many books do you use at a time?

A. Well, it all depends on the length of the tes-

(Testimony of Alice Campbell Thompson.)

timony how many books I use. Sometimes I don't use a full book and sometimes I do, and sometimes I use two books.

Q. Yes, but you've got the first case that was tried when you opened up Court and you've got a reference to a $10.00 fine and you've got Duncan, all in one.

A. No, there's another case before that, the case of Vandermar.

Q. Well, let's hear what you have about that?

A. Well, I just read that to you.

Q. Yes, you've got two matters.

A. That's all I have in this book.

Q. Well, now, what happened to the others?

A. Well, I couldn't tell you. I'd have to get my notes on that.

Q. I see. Do you know whether or not there are any oaths administered when they try these cases there in the Provost Court? I don't mean profanity. Are the witnesses sworn?

A. No, each witness is arraigned.

Q. Just arraigned but not sworn? You never take down what the Prosecutor says in arraigning them? A. I don't take the charge down, no.

Q. You don't take down any conversation between the Judge and the Prosecutor or the Defendant and the Judge until you get down to the actual event itself, to the actual trial? Isn't it fair to [482] say that what you try to do is to take down a brief synopsis of what took place?

A. No, I take down the actual testimony at a trial.

(Testimony of Alice Campbell Thompson.)

Q. How many words can you take a minute?

A. Well, I passed tests—a hun——

Q. Two hundred fifty a minute?

A. Well, I won't say that, but I know I can do it. I've done it.

Q. You have taken a test in which *you* grade has been more than that or at least that?

A. No, I have never taken a test, no.

Q. You have never worked as a court reporter?

A. No, I have never done court reporting before.

Q. I want to be perfectly fair with you. Do you pose yourself out as a court reporter?

A. Well, I have satisfied the people out there with my work.

Q. No, I'm talking about court reporting—an ordinary civilian court.

A. Yes, I can take testimony at a trial that we have down there.

Q. The trials that you have down there in Provost Courts? A. Yes.

Q. But do you think you can do the work in a court of record?

A. Well, I'd have to be given a trial first.

Q. Have you ever taken any tests for speed?

A. No, I haven't. I've taken testimony of courts and boards [483] in the yard. I took a diving case and I took a suicide case. They don't know whether it was suicide or murder. And I took that. And that was transcribed to the approval of all the men in charge.

(Testimony of Alice Campbell Thompson.)

Q. Is it your regular practice to transcribe your notes in Provost Court cases?

A. When I am asked to, I do.

Q. I asked you if that is your regular practice to transcribe the notes?

A. I don't transcribe the notes until I am asked to transcribe them.

Q. In other words, it is something unusual that you should transcribe notes in a Provost Court case?

A. Yes, and I have done that.

Mr. Anthony: That's all.

By the Court:

Q. What system of shorthand do you use?

A. I use Pitman.

Q. Where does the Duncan case begin? (Referring to notebook)

A. At the top of the page.

Q. What's that? (Indicating)

A. That's those cases that I just read, the previous cases.

Q. Where does this end—your notes here on the Duncan case?

A. On the Duncan case, there. (Indicating in notebook)

Q. Is that the next case following? (Indicating)

A. Yes.

Q. Where do you put your dates? [484]

A. I didn't put the date on that. The date is always on the charge, and sometimes I omit doing that.

(Testimony of Alice Campbell Thompson.)

The Court: Is it proposed to put the original notebook in evidence?

Mr. Ennis: Well, your Honor, I did offer the transcript from the notes in evidence for the record. Did your Honor receive the transcript in evidence?

The Court: I don't believe that was passed on. It was subject to an examination as to qualifications, but in only for identification first. I don't think it was offered in evidence yet.

Mr. Ennis: Well, my recollection was that I did, and in order to make it clear, your Honor, I do offer the transcript in evidence. I will also offer the notes of the March 1st and March 2nd hearing in evidence.

The Court: The transcript is received in evidence as Respondent's Exhibit No. 1. Is that your first one?

Mr. Ennis: Yes. And the notes from which the transcript, as testified, has been made, is Exhibit 2.

(Respondent's Exhibits "No. 1" and "No. 2" were received in evidence.)

[Printer's Note: Respondent's Exhibit No. 1 is Set out in full as Exhibit Q to Return and Answer to Order to Show Cause, at page 367 of this printed record.]

The Court: Are you through with your witness?

Mr. Ennis: No, your Honor. I also offer in evidence the notes of the March 1st hearing which the witness read into the record.

The Court: Oh, yes.

(Testimony of Alice Campbell Thompson.)

The Witness: This is the one the arraignment is in. (Indicating) [485]

The Court: The first one here?

The Witness: No, this is the arraignment. I can show it to you. This one right here. (Indicating in notebook.)

The Court: Exhibits 2 and 3 received in evidence.

(Respondent's Exhibit "No. 3" was received in evidence.)

The Court: I think that's all.

Mr. Anthony: How long did it take to try Duncan?

The Witness: I don't remember.

Mr. Anthony: That's all.

Mr. Ennis: That's all. Thank you, Mrs. Thompson.

(Witness excused.)

ROBERT C. BOWERMAN, Corporal, U.S.M.C., a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Will you state your full name and present occupation?

A. Robert Carl Bowerman, Corporal, U.S.M.C.

Q. What are your present duties?

(Testimony of Robert C. Bowerman.)

A. I'm in the main gate detachment at Pearl Harbor.

Q. What are your duties there?

A. I'm the Corporal of the Guard, sir. My duties are Corporal of the Guard at the main gate and the gates of the Navy Yard.

Q. What do you do as Corporal of the Guard?

[486]

A. Well, I'm in charge of my men in the inner section and make sure that they carry out their duties that they are supposed to, correct them if anything is wrong.

Q. What are their duties?

A. Checking identifications going into the Navy Yard and carry on all the orders, make sure that nothing is stolen from the Navy Yard, no disurbances whatsoever; no liquor, ~~cameras, firearms,~~ unauthorized firearms are allowed in the Navy Yard.

Q. Is it their duty under supervision to keep order at the gate? A. Yes, sir.

Q. I show you Respondent's Exhibit No. 1 in evidence and I direct your attention to that part of the exhibit which purports to be a transcript of your testimony at the Provost Court trial of the Petitioner on March 2, 1944. You did testify at that time? A. Yes, sir.

Q. Will you take your time and read your testimony and tell the Court whether that is a correct transcript of the questions you were asked and the answers you made, as you remember them? (Handing witness a transcript.) Just take your time.

(Testimony of Robert C. Bowerman.)

(Witness examines transcript.)

Q. Have you read all of your testimony, Corporal? A. Yes, sir.

Q. Does Respondent's Exhibit No. 1 contain a correct transcript of all of your testimony?

A. Yes, sir. [487]

Q. Did you give any testimony which is not contained in the transcript? A. No, sir.

Q. Do you recall the Petitioner's testimony on that occasion, Duncan's testimony?

A. Yes, sir. No, I don't remember word for word, sir.

Q. No, I don't suppose you would, but will you read here the transcript of Duncan's testimony and will you state to the Court whether this is a correct transcript of his testimony as you recall it? It begins here. (Indicating.)

Counsel will stipulate, your Honor, that Government's Exhibit 1, the original of the transcript of the testimony, is the same as the copy annexed as an exhibit to the response and answer and is the same as the copy upon which the Petitioner was cross-examined yesterday.

Mr. Anthony: That is correct, your Honor. If I discover any errors I will direct them to the Court's attention.

The Court: Well, for the Court's information, has that been prepared and checked by you?

Mr. Ennis: Yes, your Honor, we have done so.

The Court: All right.

(Testimony of Robert C. Bowerman.)

Q. You have read the Petitioner's testimony?

A. Yes, sir.

Q. Is that, according to your best recollection, a correct record of his testimony? A. Yes, sir.

Q. Does it, according to your best recollection, contain [488] all the testimony that he gave at that time? A. Yes, sir.

Mr. Ennis: Now, if the Court please, subject to use only, if the Court does not strike out the testimony of Petitioner and Petitioner's witnesses about the actual occurrences at the gate, I would like to question Corporal Bowerman on that subject; but, of course, it would not stay in the record if your Honor strikes out the other testimony, but if the other testimony is in, I would like his version of that unhappy event also in the record.

Mr. Anthony: You already have that in the transcript, haven't you?

The Court: Well, it not having thus far been settled as to whether the other will stay in or not, you may go ahead under the same terms and conditions as surround the other testimony.

By Mr. Ennis:

Q. Corporal Bowerman, you have testified that this Exhibit No. 1 contains a correct account of the testimony you gave? A. Yes, sir.

Q. Is it also a truthful account of what occurred on the occasion in question at the Pearl Harbor gate? A. Yes, sir.

Q. Were you struck by the Petitioner on that occasion? A. Yes, sir.

(Testimony of Robert C. Bowerman.)

Q. Did you bear any mark as a result of that striking?

A. Yes, sir, my upper lip and my lower lip were cut inside, and I had a cut under my left eye—I was bleeding. [489]

Q. How were those injuries inflicted on you by the Petitioner?

A. I took him over the intersection and sat him down and asked for his badge. He said he wasn't going to give us his badge. You want the words used, the profanity words?

Q. No, that won't be necessary. Is the account that you have stated to the Provost Court trial a correct account of the words he used?

A. Yes, sir.

Q. Well, then, you don't have to repeat them here, but just tell us the action that occurred.

A. I asked for his badge and he wouldn't give it to me, and I reached for it. He was holding on to it, and I tried to take it off his head, and he clipped me one on the mouth.

Q. What with? A. His fist.

Q. Do you remember which arm, which hand?

A. No, sir; I was on his right and I imagine it was on his right arm. He came up pretty fast. I wasn't expecting it. And Hunter tried to pin his arms down so I could take his badge away from him, and he hit me underneath the eye and he was kicking at me all the time he was doing it, both Hunter and I know.

(Testimony of Robert C. Bowerman.)

Q. He was kicking you? A. Yes, sir.

Q. In your opinion were the blows with his hand deliberate?

A. Yes, sir, I don't see how they could be anything else but [490] deliberate.

Q. How much do you weigh, Corporal?

A. One hundred forty-seven pounds, sir.

Q. In your opinion, how much does the Petitioner weigh?

A. I would say about 190-200, somewhere around there.

Q. Was anyone else present besides you when you were struck by the Petitioner?

A. Yes, sir, Pfc. Hunter was.

Q. That's Private Hunter?

A. Private Hunter, yes.

Q. Did you have a discussion with the witness Weities after he came back on the truck?

A. Yes, I did.

Q. What was that discussion?

A. He came back from the truck and walked up and I said, "Well, are you satisfied now that you can't get to the ship through the Navy Yard?" and he said, "Yes." And I noticed he was hugging his arm to a side a little bit, and I looked again and I could see the outline of a bottle there. So I asked him what he had under his coat.

Mr. Anthony: Just a minute. What's the relevance of this?

The Court: It seems corroborative.

Mr. Ennis: We just testified on the subject, and

(Testimony of Robert C. Bowerman.)

I think that the fact that the Petitioner, as witness in his own behalf, admitted they were drinking at the time, that it has some relevance on their credibility and makes better testimony. [491]

Mr. Anthony: I don't see that it has any relevance on their testimony. I don't see the purpose of it. It has nothing to do with the Petitioner.

Mr. Ennis: Well, I submit, your Honor, that the Corporal's account of his conversation with Weites, about which Weites has testified, should be received.

Mr. Anthony: The only reason that came out was on cross-examination, not on direct examination of the witness Weities; Mr. Ennis brought that out, and now he wants to change it, I guess, I don't know.

The Court: Well, I don't see where it is in any manner relevant, but you may go ahead.

By Mr. Ennis:

Q. Will you finish your account of that conversation?

A. I asked what he had under his coat, and he said "Nothing." I told him to lift up his arm, and he lifted up his arm and I could see a bottle and I told him to hand it over. I wrote him a ticket for the bottle and gave it to him. And the bottle—the seal had been broken and about a third of it drank—I wrote that on the ticket. And he asked me and said, "Well, what's the best way to go back to the ship again?" I said, "Take

(Testimony of Robert C. Bowerman.)

the road through the housing there and thumb a ride back to Pearl City." And that's all.

Q. How long have you been Corporal at the main gate? A. Beg pardon, sir?

Q. How long have you been Corporal at the main gate? [492]

A. I imagine around eight months. I've been standing Corporal of the Guard watches up at the gates 16 or 17 month now.

Q. You have? A. Yes, sir.

Mr. Ennis: That's all.

Cross Examination

By Mr. Anthony:

Q. Corporal, on this night in question, how did this argument that you had with Duncan arise?

A. I was sitting behind a desk and Weities asked me the best way to get back to his ship. And so the road that he takes if he was standing where he asked me, he couldn't see it, in view of it being obstructed. So we stepped out about three feet from the desk and I pointed to the road and told him to take this road to the left, to hit the highway, turn to the left, and thumb a ride back to Pearl City. And he said, "Well, I thought I was supposed to take a truck back to the ship." And I said, "The truck only goes to the ships that are tied up in Pearl Harbor itself." And Duncan, I hadn't noticed him before; he was standing about five feet away from me, I believe. I guess he was taking in our whole conversation, and he called me

(Testimony of Robert C. Bowerman.)

a vile name and said I was trying to foul his buddy up.

Q. Just stop right there. You testified down in the Provost Court that it was Duncan that came up to you, do you recall that, and asked for the instructions? [493] A. No, sir.

Q. You didn't say that?

A. Not that I recall, sir.

Q. Are you sure of that?

A. Not that I recall. I won't say I'm sure but I just can't recall it that way.

Q. Well, go on with your story. After that occurred, what happened?

A. Well, I looked at him and I wondered what he was doing butting in. I turned my back on him and tried to explain to Weities again. Duncan wised off again in a pretty loud and unruly manner, and I told him that I'll handle this business—why doesn't he shove off? And he said he doesn't have to shove off, and I was trying to foul his buddy off. And inside the Navy Yard at the time it was pretty busy up there, it was a pretty busy part of the evening, so I walked over to him and I noticed, I could smell the liquor the first thing as I walked up. I don't know whether it was liquor or rum, but I could smell something as soon as I got near him. His badge was flipped over.

Q. He what?

A. I couldn't see the face of his badge. It was hung on a lanyard around his neck, I believe.

(Testimony of Robert C. Bowerman.)

Q. Did you ask him for his badge?

A. I placed him under arrest.

Q. Right away? For what?

A. For using profane language when I told him to shove off [494] and he said he didn't have to shove off.

Q. Is that against the rules of the yard, using profane language?

A. Yes, sir, in an intersection such as that, definitely.

Q. You never used any profane language down that intersection?

A. Not while I was on duty, sir.

Q. Not that night in particular?

A. No, sir.

Q. You are quite sure of that?

A. Yes, sir.

Q. What regulation is that in violation of?

A. Not that I know of, I can't name the violation, sir, but you are not supposed to use profanity in the manner he was using it and in a loud tone like that when there's women present and a lot of high officials. You just don't do it, that's all.

Q. So you put him under arrest for using profanity? A. And interfering with my duties.

Q. In what way did he interfere with your duties?

A. I was trying to tell this seaman how to get back to his ship, and he wouldn't let me explain to this man. He stood there diverting my atten-

(Testimony of Robert C. Bowerman.)

tion, and these other sentries' attention, away from my duties by standing out there using and calling us vile names and telling the seaman that he didn't have to do what I told him to do but to do what he said.

Q. The gist of your complaint was that he was telling the [495] seaman a way to get back to the ship and using profanity, isn't that it?

A. He wasn't telling the seaman, sir. He directed his conversation to me.

Q. Are you sure of that? A. Yes, sir.

Q. You grabbed for his badge?

A. No, sir, I didn't grab for it.

Q. You asked for it, "May I have it, please?"

A. No, not like that, sir, I didn't.

Q. How did it happen?

A. I placed him under arrest. I said, "You are under arrest for using profane language and interfering with my duties; let me see your badge." He just stood there. I reached up to flip it over, and in case he broke arrest I'd have the number of his badge.

Q. And regulations require that you take the badge? A. Yes, sir.

Q. Or just the number?

A. Take the badges themselves, sir.

Q. Well, you in fact got his badge, didn't you?

A. I tried to flip it over and he took a swing at me.

Q. And you pulled it over his head?

A. No, sir.

(Testimony of Robert C. Bowerman.)

Q. How did you get it?

A. After he took a swing at me—he took a swing and missed me—I took him by the arm and to take him off the intersection. [496] There were at least 20 or 30 seamen over there. Some of them had been drinking. A lot of cars were coming in and we don't want any confusion in the intersection to block traffic; cars and people were stopping on the sidewalk, walking in to see what the commotion was about. I wanted to get him off the sidewalk and get him out of the way.

Q. You thought he was a seaman?

A. No, sir; I saw his badge around the neck. I didn't see the face on it. There was a number on it.

Q. Did you hit him at any time?

A. No, sir.

Q. Did you have your club out?

A. No, sir.

Q. You didn't have your club with you at any time? A. No, sir, I didn't have any club.

Q. You didn't go in and get your club?

A. After I had his badge and had laid it on the desk, Duncan sat on the side, and I told Pfc. Hunter to look it over and I was going to have the Civil Service Police pick him up. And Duncan started to call me names, calling us names and threatening to kill us if he ever met us outside. And after being hit in the mouth, my lips were bleeding and everything, I took a club over there and decided I had taken enough beating

(Testimony of Robert C. Bowerman.)

at his hands and I told him to shut up or else I'd have to use the club on him. So he shut up.

Q. Did you give any instructions to any guard out there to [497] plug him if he moved?

A. No, sir.

Q. Are you sure of that? A. No, sir.

Q. You're not sure?

A. I mean, yes, sir, I am sure of it.

Q. Was Duncan marked up by any of your blows?

A. No, sir, not that I know of. I didn't see any marks on him.

Q. You didn't? A. No, sir.

Q. You took him to a dispensary for a sobriety test, did you? A. No, sir, I didn't.

Q. Some other marine did that?

A. No, sir, not that I know of. I turned him over to the Civil Service Police and I believe they took care of him, sir.

Q. I see. Now, at the same time this was happening Private Hunter came along, is that right?

A. He was the sentry on duty there, sir.

Q. Was there any altercation between Duncan and Hunter?

A. He assisted me in seating him down and assisted me in getting his badge away from him.

Q. Did Hunter strike at the defendant?

A. No, sir, not to my knowledge. I didn't strike him, sir.

Q. Did Duncan strike at Hunter?

(Testimony of Robert C. Bowerman.)

A. Yes, sir. I saw Duncan was throwing quite a few fists [498] there, and I saw Hunter go back, his hat fall off, and I heard Hunter yell once, and after it was all over I asked him what he yelled about, and he said Duncan had kicked him in the shins.

Q. Did you ask Duncan whether he was a shipfitter? A. A what, sir?

Q. Did you ask Duncan whether or not he was a shipfitter? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. As I understand it, after you announced that he was under arrest, he was perfectly docile, is that correct? A. No, sir.

Q. He didn't do anything to you after that, did he?

A. After I announced him under arrest, yes, sir. I put him under arrest and asked to see his badge, and he stood there, and I asked to turn his badge over, and he took a swing at me.

Q. You first put him under arrest after talking to his buddy how to get to the boat?

A. No, sir, for interfering with our duty.

Q. Well, that was just talk?

A. Well, it was more than that.

Q. What more than talk had he done when you put him under arrest?

A. Well, there's different ways of talking. If a man was just out there telling a joke, it wasn't bad, but he was using profanity and cussing and stopping traffic. [499]

(Testimony of Robert C. Bowerman.)

Q. Well, where was he standing at that time?

A. Inside the yard, about, oh, I'd say six, seven feet, and he was off the sidewalk about two feet out in the intersection; and about, I'd say, 20 feet space was there for cars and pedestrians to go in, and pedestrians and bicycles to walk out.

Q. Now, Corporal, isn't it a fact that up to the time you put him under arrest, Duncan had done nothing except talk?

A. He was refusing to obey my orders. I told him to shove off and he didn't shove off. He said he didn't have to shove off.

Q. Well, did he have to shove off?

A. Yes, sir, if he was interfering with my duties, and he was interfering with my duties, and large crowds were gathering. We had three men out there—four counting myself—one man was further down checking the bus, so I had two men and myself out there, and we have to check the automobiles coming in, pedestrians coming in, bicycles coming in, and pedestrians going out, and watch these merchant seamen to see that they don't go into the yard unescorted.

Q. Corporal, wasn't it a fact that you were pretty sore at Duncan because he contradicted your instructions, isn't that it? Tell the truth, isn't that the fact, that that made you sore?

A. I can't describe the feeling, sir. It happened. I don't know whether I was peeved or not. I know it shouldn't have been done.

(Testimony of Robert C. Bowerman.)

Q. You were sore about it, weren't you—this fresh guy that was saying something that you knew was wrong? [500]

A. I won't say I was sore about it. I just knew he was wrong, that's all. I told him he was wrong.

Q. It didn't make you sore at all?

A. I don't know what the proper definition of the word means, sir.

Q. You have never been sore?

A. I've been sore, sir, but I don't know where it begins and where it leaves off.

Q. You were going to see to it that Duncan was charged for that incident, the use of profanity and interfering with the instrutcions that you got?

A. Yes, after I told him to shove off and he said he didn't have to shove off, I was.

Q. You pushed him down in his seat?

A. After he took the swing at me, yes, sir. Hunter and I took him by the arm and he was trying to break loose and bucking us and kicking us, so we set him down.

Q. You weren't actually afraid of bodily harm, were you? A. No, sir. I wasn't.

Mr. Anthony: That's all.

Mr. Ennis: That's all. Thank you.

The Court: Just a minute. I didn't get it. Was one of your duties there to direct these merchant seamen as to where they could find their boats, or was that not one of your duties?

The Witness: No, sir. I have never heard an order on that. They know where they are tied up

(Testimony of Robert C. Bowerman.)

when they pull in. We don't know [501] the whereabouts of a ship. If a man comes up and says, "My ship has moved on me," or something, well, then I have to call into the office to my Lieutenant who has a confidential list, and he tells me the ship movement. But usually the people come up and they know where their ships are tied up. And we just said it's tied up at Pearl City, so I told him the easiest way to get there, and that he couldn't go through the yard and explained that the trucks only carry to the ships and that Pearl City wasn't in the Navy Yard.

The Court: Well, that was just voluntary information you were giving him as a matter of courtesy.

The Witness: And if I hadn't given it to him, well, he might tell people and they would stand there and argue with you and get in the way when you're busy like that.

Mr. Ennis: That's all, your Honor.

The Court: That's all.

(Witness excused.)

Mr. Ennis: I would like to offer in evidence at this time, your Honor, as Respondent's Exhibit No. 4 a comment by General Emmons, reported in the Honolulu Advertiser of today's date, April 6th, 1944.

Mr. Anthony: No objection.

The Court: Received in evidence as Exhibit 4, a clipping from this morning's Advertiser.

Mr. Ennis: Yes, containing a statement by General Emmons that the Japanese attacking on the Pacific Coast of the United States is still possible. [502]

(Respondent's Exhibit "No. 4" was received in evidence.)

RESPONDENT'S EXHIBIT No. 4

Honolulu Advertiser, Apr. 6/44

Emmons Says Jap Attack On Coast Possible

San Francisco, April 5 (UP)—In a letter to the 9th regional office of civilian defense, Gen. Emmons said that under the existing military situation in the Pacific the enemy "has the following capabilities and it is possible an attack on Pacific coast targets may be made in any of the following manners or combinations thereof:

"1. Sabotage of vital industries, communications and public utilities.

"2. Submarine attacks by shelling vital coastal installations.

"3. Limited air attack on the Pacific coast by carrier-based planes, with possible targets in vital production and congested areas.

"4. Nuisance bombing and incendiary attacks by submarine-based planes on forested and congested areas.

"5. Commando raids by landing parties in vital areas."

[Endorsed] Filed 4-6-44.

The Court: It is after four now. Do you have another short witness?

Mr. Ennis: Well, I have Private Hunter, whose testimony is similar to Corporal Bowerman's your Honor. We can go on or wait until tomorrow, or just as you wish.

The Court: Would it be any real hardship on them to appear tomorrow? Well, I think we might just as well adjourn at this time. The Court is adjourned until nine o'clock tomorrow.

Mr. Anthony: Before the Court adjourns, your Honor, may I ask one question of Mrs. Thompson before she leaves the Courtroom? Would you mind coming up here, Mrs. Thompson?

The Court: You said one question. Do you wish her to take the stand?

Mr. Anthony: No, your Honor, she can stand right here.

Q. Mrs. Thompson, can you explain to me why this original transcript has no numbers in the middle of the page and the copy that I have attached to the petition is numbered?

A. Why, I made this copy but I didn't make that one.

Q. What was the one that was attached to the petition made from?

A. Attached to the petition?

Q. Yes. This is the petition—I mean attached to the return to the order to show cause. This is the Government paper which was filed in this Court, and evidently it was made from some original.

A. Well, there were copies made from this. This is the one that I typed. [503]

Mr. Ennis: You don't know? You don't know how this particular copy was made?

Mr. Anthony: You don't know? All right, thank you.

The Court: When was this made? Will you ask the witness when was this made?

Mr. Ennis: Mrs. Thompson, would you like to answer one more question for the Judge?

The Court: When did you make that transcript?

The Witness: I made this original transcript when Judge Mundo asked me to. I just don't remember when. And he said, "Type it up."

The Court: Right away after the trial or after this case started or when?

The Witness: I don't remember just how long afterwards it was—about a week, I think. I'm not sure.

The Court: You made it at the request of the Judge?

The Witness: Judge Mundo.

The Court: All right.

(The hearing adjourned at 4:15 o'clock p.m.)

[504]

Honolulu, T. H.
April 7, 1944
9:00 o'clock, a.m.

(The hearing continued.)

The Clerk: Habeas Corpus Docket No. 298, in the matter of the application of Lloyd C. Duncan for a Writ of Habeas Corpus, called for further hearing.

Mr. Anthony: Ready for the Petitioner. May we proceed, your Honor?

The Court: You may proceed.

Mr. Anthony: Governor Stainback, will you take the stand, please?

HON. INGRAM M. STAINBACK,

Governor of the Territory of Hawaii, a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please?

A. Ingram M. Stainback.

Q. At the present time you are the Governor of the Territory of Hawaii? A. I am.

Q. Governor, where were you born?

A. Somerville, Tennessee.

Q. Did you go to school in Tennessee? [505]

A. Yes.

Q. And where did you go to college?

A. Princeton and the University of Chicago Law School.

(Testimony of Hon. Ingram M. Stainback.)

Q. What year did you come to the Territory of Hawaii? A. 1912.

Q. And you have resided in the Territory ever since 1912? A. I have.

Q. Have you ever held any Federal office, any office other than Governor?

A. Yes, quite a number.

Q. What are those offices, Governor?

A. Attorney General of the Territory, U. S. Attorney for the District of Hawaii, U. S. Federal Judge; besides, I have been on a number of commissions, public utility commissions—several others.

Q. Under the Territorial Government?

A. Yes.

Q. In between——

The Court: You were in the Army also, were you not?

A. Yes. Yes, I was in the last war for two years, but I still resided in the Territory.

Q. You were an officer in the U. S. Army during the last war? A. Yes, I was.

Q. During the times when you did not hold public office, [506] did you practice law in this Territory? A. I did.

Q. And that involved a general practice of law?

A. A general practice of law, yes, mostly civil, very little criminal.

Q. Do you believe that you are quite familiar with the affairs of this Territory?

A. I think so.

(Testimony of Hon. Ingram M. Stainback.)

Q. You, of course, were here on December 7, 1941?

A. Yes, I was Federal Judge at that time.

Q. You were familiar with the conduct of the community immediately following December 7th and the state of public order or disorder—are you?

A. I think so.

Q. Governor, was there anything that prevented the courts from functioning in accordance with law immediately following the attack of December 7, 1941?

A. No. As a matter of fact, I did hold Federal Court on December 8th in the adjoining room.

Q. Immediately after the attack, you recall the military authorities took over portions of Iolani Place, do you recall that? A. Yes.

Q. Do you recall what occurred in regard to the placing of barbed wire around Government buildings? [507]

A. Yes, barbed wire was placed around there and——

Q. The City Hall?

A. City Hall, I believe; I am not sure; I had no occasion to go over there. This building was barricaded with sand bags and the front doors closed, and we had to come in the back way for several months; machine guns were placed back in this corridor back there, sand bags erected.

Q. What have you to say as to the conduct of the population during the period following the outbreak of war, the civil population?

(Testimony of Hon. Ingram M. Stainback.)

A. I would say it was admirable from every standpoint; the civil population gave a wonderful account of itself, both on the 7th and subsequent to; the various organizations that had prepared for attack and everybody seemed to be most intent on doing what they could to protect this Territory, and the Government as a whole, the United States, I should say.

Q. Governor, when were you appointed to your present office?

A. The latter part of July 23rd, I think; I took office August 17, 1942.

Q. Since you were appointed Governor, can you tell the Court how the various departments of the Territorial Government have functioned in a general way?

A. Well, I would say normally, they exercised their normal functions. Of course, we have adopted some war regulations, [508] due to the fact that we are under war conditions, like food importation and raising of food, the fact that the Government has gone into the raising of food which ordinarily, of course, wouldn't occur; we have exercised a number of functions under what we call the "M-Day Bill." Otherwise, I should say we proceeded as under peacetime.

Q. The Hawaii Defense Act granted broad powers to the Governor, as you know. Is that not correct? A. Yes.

Q. Do you know of any other piece of legislation in the United States or any state of the United

(Testimony of Hon. Ingram M. Stainback.)

States, or in any English-speaking country, that grants any broader powers than the Hawaii Defense Act grants to the Chief Executive?

A. I don't know of any. Of course, I couldn't say that I have examined all the legislation of all the states and countries, but I personally don't know of any.

Q. Will you briefly state the operations of the Office of Civilian Defense in this Territory, what briefly has been done in that regard?

A. Well, it is what the name designates. We have provided for the care and protection of civilians during the time of emergency. They have set up first aid stations and ambulance corps, blood banks, and matter of that kind to meet any casualties that might result from bombs or attack of any kind.

Q. An elaborate system of air raid wardens?

[509]

A. An elaborate system of air raid wardens, fire wardens and fire companies, volunteer companies, first aid volunteers, and a great many matters relating to the protection of the civilian community. We have even set up first aid hospitals, and some of these hospitals we have used—because of the pressure, we are using them now not as first aid but as general civilian hospitals.

Q. Governor, do you recall, do you have any recollection of the approximate number of people engaged in O.C.D. activities? A. Now or——

Q. At the present time.

(Testimony of Hon. Ingram M. Stainback.)

A. I think I have the figures; some 700 or 800, I think; 803 as of March, 1944. In November, 1942, we had 2,513.

Q. Are they full-time employees, Governor?

A. Yes, I think that is correct.

Q. In addition to that, there is a large number of volunteer workers for the O.C.D., is that not a fact?

A. Oh, yes, quite a number. I wouldn't be too positive as to whether all those people are full-time employees. I have no data to show whether they are all full-time employees.

Q. What was the budget of the O.C.D. when you took office, Governor?

A. Well, in November, 1942, is when I have the statement; that was three months after I took office; a little over two months. It was $738,441.13 per month. [510]

Q. What is it at the present time?

A. March, 1944, $193,349.78. The only increase has been in certain emergency medical services, due to taking over certain tubercular patients. Outside of that, there has been a decrease in every department.

Q. What has been the progress of the O.C.D. organization in regard to the expenditure of funds? In which direction has that gone since your term of office?

A. Well, it has gone down, I'd say, some 74 per-cent.

(Testimony of Hon. Ingram M. Stainback.)

Q. And what is the occasion for that?

A. Well, because we don't feel that there is justification for keeping up the expenditures on a great many lines. For instance, we are doing away now—we haven't yet but we are going to do away with these first aid stations, and we will have mobile units, volunteer units. I might add that practically all this reduction was done under and with the advice of Dr. Bayer, who is down here to survey this. He is head of the O.C.D. medical department—he was; he is also connected with the Public Health of New York State.

Q. That's Colonel Bayer attached to the Public Health Service?

A. Yes, Colonel Bayer, who is a Colonel in the O.C.D.

Q. Have you had occasion during your term of office to visit the other islands of this group, Governor?

A. Yes, I visited all of them at least once or twice or [511] more, several times, I think, with the exception of Lanai and one of the small islands; but Hawaii, Kauai, Maui, Molokai, I visited.

Q. From time to time you confer with members of the Armed Forces in regard to the state of this Territory? A. Yes, yes, we have to.

Q. On preparedness?

A. Yes, hardly a week passes that there isn't some question that has a bearing on the Armed Forces. Last week there was the question of water on Kauai; we had to divert certain funds to in-

(Testimony of Hon. Ingram M. Stainback.)

crease water supply in certain districts because of the presence of large numbers of Armed Forces. I have to keep familiar with that. On Maui, the President of the Board of Health is now over there—at least was the other day—in connection with certain diseases brought in by Marines. And in my duties as Governor, naturally I've got to be thoroughly familiar with the Armed Forces here where they are.

Q. Do you obtain any information in regard to the state of defense of these islands?

A. I think I know very thoroughly the state of defense of this island. I have visited most every—I won't say dug-out, but the principal parts.

Q. Installations?

A. Installations. I have, on this island and the other islands, watched the operations of the air defense system, that is, what you might term the Radar. I have talked with [512] many many officers, both Army and Navy, on various questions involving the set-up here, to get their opinions on various problems, not always in an official way. In fact, we very seldom meet that something isn't discussed or brought out with reference to either military or Navy—maybe not on any particular installation or matters of that sort. I have talked with high Army officers and low officers on questions of the possibility of invasion and matters of that sort in great detail.

Q. Governor, having in mind your statutory duties under Section 67 of the Hawaiian Organic

(Testimony of Hon. Ingram M. Stainback.)

Act, do you have an opinion whether or not Hawaii is now in imminent danger of invasion?

A. Yes, have an opinion.

Q. Will you please state your best judgment on that question?

A. I do not think it is in imminent danger of invasion.

Q. Having in mind your duties as Chief Executive under Section 67 of the Hawaiian Organic Act, do you have an opinion whether or not the public safety requires the suspension of the privilege of the Writ of Habeas Corpus?

A. I do not think so.

Q. Will you give us your best judgment whether or not any military necessity exists for the trial of civilians in provost courts for crimes and offenses other than crimes against the laws of war? [51]

Mr. Ennis: I object, your Honor, on the grounds that I don't believe the Governor is qualified to answer the question based upon military necessity.

Mr. Anthony: If the Court please——

The Court: Well, he's asking for his opinion based upon his knowledge and his responsibility as Chief Executive of the Territory. I think that that shows a sufficient qualification to have and express an opinion on that subject.

Mr. Ennis: Well, I'd like to make my point clear, your Honor. I thought the prior questions as not objectionable because they were addressed to the Governor's statutory duties under Section 67 of

(Testimony of Hon. Ingram M. Stainback.)

the Organic Act, his view on what the public safety requires and the suspension of the privilege of the writ, and his view as to whether there is an imminent danger of invasion. But the last question that Mr. Anthony asked was, whether in his opinion military necessity required provost courts. Now, there is nothing in Section 67 of the Organic Act which bears on that specific question, and I think that, including in the question the phrase whether in his view military necessity required it, goes beyond the qualifications of the Chief Executive of the Territory.

Mr. Anthony: Your Honor, this will get us on an argument on the question of law, which later will be addressed to this Court, namely, whether or not Mr. Ennis's idea of how martial law operates is correct, or whether the Petitioner's idea is correct. Our view is that the Chief Executive, in truth and [514] in fact and in law, is the Chief Administrator, if I may use that phrase, of martial law when it is properly operated. I concede, that is not the way it is being done at present, but if any view of the law is correct, then it is important to ascertain from the Chief Executive whether or not any necessity exists for the trial of civilians in military tribunals.

The Court: Objection overruled.

Mr. Ennis: Exception.

The Witness: May I have the question?

(The Reporter read the last question.)

(Testimony of Hon. Ingram M. Stainback.)

A. I know of no reason, military or otherwise, why they should be tried in provost courts.

By Mr. Anthony:

Q. Governor, you have given us your best executive judgment on whether the Territory is in imminent danger of invasion and whether the public safety now requires the suspension of the privilege of the Writ of Habeas Corpus, and your answer has been that it does not and that Hawaii is not in imminent danger of invasion. Will you please give us your best judgment as to the answer to those questions during the year 1943?

A. I do not think it was in any imminent danger of invasion during the year 1943. I would say, subsequent to Midway, in 1942, that we could never call this Territory in imminent danger of invasion. I understand the word "imminent" means about to occur immediately. [515]

Q. That's a matter for the Court.

A. Yes. So under that interpretation I certainly have not felt, since I have been Governor, that we have ever had any imminent danger of invasion.

Q. Now, in your judgment did the public safety require the suspension of the privilege of the writ of Habeas Corpus during the year 1943?

A. No.

Q. Governor, you have seen from time to time the General Orders issued out of the Office of the Military Governor, have you not?

(Testimony of Hon. Ingram M. Stainback.)

A. Yes, I think my office is usually furnished a copy, I believe.

Q. At any time since you have been the Chief Executive of this Territory, have any of those orders been submitted to you for your approval?

A. No, not to my recollection.

Q. The practice has been to issue those orders without your approval, is that not correct?

A. Yes, that is true.

Q. At any time during your tenure as Chief Executive have you ever been notified in advance of the issuance of any of the General Orders that have been issued out of the Office of the Military Governor?

A. I believe they did issue an order on the chlorination of water; I know, I think we discussed that prior to an order, [516] direction, that I gave that the water be chlorinated. I am not sure they issued an order on that; I believe they did but I am not sure. That was talked over quite at length with General King.

Q. That involves some financial arrangement?

A. Yes, that is a question of who was going to pay the bill and other matters, too.

Q. Governor, are you familiar with the existence of censorship in this Territory?

A. Yes, I am.

Q. Do you know whether or not the mails between here and the mainland of the United States are now censored? A. Yes.

(Testimony of Hon. Ingram M. Stainback.)

Mr. Ennis: Objection. It is irrelevant. May I have the answer stricken, your Honor?

Mr. Anthony: I have no objection to it going out, for Counsel to get in his objection.

The Court: It may be stricken.

Mr. Anthony: I believe it is relevant on the issue of what the pubiic safety requires.

The Court: It is stricken.

Mr. Anthony: I don't hear the Court.

The Court: It is stricken.

Mr. Anthony: I now ask that the witness be permitted to answer the question. I believe it is relevant to the issue as to what the public safety requires. [517]

The Court: The witness answered the question. Upon motion that it be stricken, it was ordered stricken.

Mr. Anthony: And your Honor now sustains an objection to me asking that question, is that the Court's position?

The Court: I don't follow you.

Mr. Anthony: I will ask the question again.

Q. Is there censorship of the mails between Hawaii and the mainland of the United States at the present time?

Mr. Ennis: Objection, on the ground that the answer to that question is irrelevant to the issues in the case, your Honor.

The Court: Well, as I understand it, that is the same question that was asked and answered before. It was moved to strike.

(Testimony of Hon. Ingram M. Stainback.)

Mr. Anthony: That is correct.

The Court: It was moved to strike the answer and the answer was ordered stricken.

Mr. Anthony: Yes, I understood. Maybe I'm a little dull this morning. I understood it was stricken, but for the purpose of Mr. Ennis to get in a proper objection so that the Court could then rule on it, I would like to be heard upon it before your Honor does rule upon it.

The Court: Very well.

Mr. Anthony: May I proceed?

The Court: Yes.

Mr. Anthony: One of the conditions which Mr. Ennis, [518] representing the Government, must comply with in order to maintain his position that Mr. Duncan may be tried in a provost court for a non-military offense is that the public safety requires the suspension of the privilege of the Writ of Habeas Corpus. That is one of the conditions that he must meet. Now, I propose to show by this line of evidence that the public safety may be adequately dealt with by means other than the suspension of the privilege of the Writ of Habeas Corpus and the trial of civilians in these military tribunals. I propose to show that we are a completely regimented community, that there are many other means of controlling the civil population other than the trial and conviction and sentencing of civilians in military tribunals. And on that issue I think the matter of the degree of regimentation, the degree of censorship, is relevant.

(Testimony of Hon. Ingram M. Stainback.)

Mr. Ennis: If your Honor please, I still don't see the connection between censorship and trying the Petitioner in a provost court. And I don't believe that whether or not the public safety requires suspension of the privilege of the writ can be shown merely by indicating that in some respects unrelated to this case, namely, censorship, that some other means than censorship by the military, if it exists, could be adopted.

The Court: The order to strike stands.

Mr. Anthony: I'd like to make an offer of proof, if the Court please, at this time for the record. [519]

The Court: You may.

Mr. Anthony: I offer to prove that the Territory of Hawaii at this time is under complete censorship covering the mails, radio, telephone, inter-island telephone, and trans-Pacific telephone; that that censorship, so far as the mails are concerned, is a hundred percent censorship, and that intercepts are furnished regularly to the department of the Government in regard to the contents of the mails that are censored.

Mr. Ennis: I object to the proof being received in evidence, your Honor, as irrelevant to the issues.

The Court: The offer is denied.

Mr. Anthony: May we have an exception, your Honor?

The Court: Yes.

(Testimony of Hon. Ingram M. Stainback.)

By Mr. Anthony:

Q. Governor, have the departments of the Federal Government functioned according to law since the time you have been Chief Executive here—civil departments?

A. Yes, to the best of my knowledge.

Q. At any time have you observed any public disorder or commotion or civil strife in this Territory?

A. No, there has been none except as you may refer to the ordinary disorders of peacetime: fights and drunkenness and matters of that sort. There have been no riots or rebellions or anything of that sort. We have the ordinary difficulties that confront the Government in ordinary times [520] of peace, possibly exaggerated a little by a large increase in population.

Q. Have you ever conferred with any of the Commanding Generals of this Territory in regard to the necessity for the continuance of martial law?

A. Yes.

Q. With whom did you confer?

A. General Richardson.

Q. Will you please tell the Court what the substance of that conference was?

A. Well, the first time that you might say I had a formal discussion with him was—I don't remember the date but it was quite some months ago at the General's quarters in Shafter. He invited me out to lunch. I had several questions, including the matter of abolishing martial law entirely. I dis-

(Testimony of Hon. Ingram M. Stainback.)

cussed it in rather general terms, and I believe I left him a memorandum at that time and told him that I'd like for him to consider it. I pointed out that practically 95 percent of the civil government had already been restored, that such other powers as were being exercised here under the so-called military government or martial law could be accomplished in a legal way under the Act of Congress giving the President special powers to declare certain areas defense areas, and orders could be made under the authority of the President, such as prohibiting people or aliens or others from certain areas, and curfew and blackout and various things of that [521] sort; that this power had been sustained by the Supreme Court of the United States in the case of Harigashi—or maybe I'm a little off there——

Q. Hirabayashi.

A. What's the name?

Q. Hirabayashi.

A. I found, for my own protection as well as for the benefit of the community and protection of officers who were enforcing these laws, that my mind was in a much better way to operate and accomplish everything that he was trying to accomplish now if we proceeded in the Federal Court with the backing of Congress rather than with a vague idea of martial law. The General was very nice and said he would take up that matter.

I again talked about it on January 14th. The General was over to my house for lunch. At that

(Testimony of Hon. Ingram M. Stainback.)

time that came up mainly through his request to use the Territorial Board of Paroles and Pardons on men who had been committed to the Territorial prisons by the military courts. I raised quite a number of questions which I submitted to you before you left the office. I don't believe you answered, so I worked out some answers of my own and gave the General a little memorandum at that time on the question of whether there had been any legal convictions. I said this question will have to be faced some time; we just can't keep people down; some of them have been sentenced for life and some for five years; [522] and the quicker we can raise the question and dispose of it, the better it would be for everybody concerned. The question would be raised some time. And I left the little memorandum with the General and told him I didn't expect him to answer it then but I'd like for him to consider it and go into it. He was very polite and nice and agreeable but I have had no answer on that question.

He did raise then the question of the labor control, and I hadn't discussed control of labor in my agenda, as to what could be done under this Act of Congress. And he said that was one of the most important reasons, I think, to continue martial law, the important reason. I couldn't tell the Court the exact words. There has been adequate control of labor by the War Manpower Commission here, and I felt all along and expressed my opinion that time, that you can't control the water in one half

(Testimony of Hon. Ingram M. Stainback.)

of the barrel by one bunch and the other half by the other. But I believe he stated that possibly some way could be worked out whereby they would give up this control of labor. Of course, under the proclamation labor control was divided. That was one of the matters that was taken up in Washington. The Army was given the control of public utilities' laborers, the dock laborers, on Army and Navy contracts. And he felt that was vitally important to the war effort.

Q. Governor, there has been attaached to the return and answer in this cause affidavits by Admiral Nimitz and by [523] General Richardson. Have you examined those affidavits?

A. I have, not too carefully, but I examined them.

Q. Is there anything in your testimony that is inconsistent with the affidavits, in your opinion?

Mr. Ennis: Objection, your Honor, on the grounds that a comparison of the testimony and the affidavits is the proper way to determine that question and not the witness' recollection at this time of both his testimony and the affidavits.

The Court: Sustained.

Mr. Anthony: You may cross examine.

Cross Examination

By Mr. Ennis:

Q. Governor, on December 7, 1941, you were a Federal Judge of this District? A. I was.

Q. You observed on that day either any of the

(Testimony of Hon. Ingram M. Stainback.)

enemy action in the Territory or any of the results of that enemy action?

A. I did. I happened to be in my courtroom over there and came down on a Sunday to do some special work, so I heard the various explosions around about. I went back home about as fast as I could go and got in my car and took my binoculars and went up on the hill towards Kaimuki way to watch Pearl Harbor. I don't know whether I saw much of the enemy action. I could see huge clouds of smoke which I thought were coming [524] from the Dohaney tanks. I didn't know they were coming from our warships. I saw some of the planes. People were all ordered off the streets, and I went back to my home in Kahala at that time. I did see some of the planes.

Q. Some of the enemy planes?

A. Well, it was rather difficult to tell which were enemy and which were ours. I saw some dog fights over toward Koko Head—it looked like it—but it was rather difficult to insure who was who and what was what and what was happening. I can't say that I could give any detailed account of it. Of course, we listened to the radio. I did see some of the results of the fire out here, McCully way.

Q. Did you see subsequently some of the damage that was done in Pearl Harbor?

A. Yes, I saw the ships and the others. I didn't go into Pearl Harbor but it was very apparent as you passed by, the Arizona and the Oklahoma and the various ships that had been sunk.

(Testimony of Hon. Ingram M. Stainback.)

Q. From your observations, did the military forces of the Empire of Japan invade the Territory of Hawaii on that day?

A. I would say they attacked us from the air. My terminology of invasion is to enter into the country, to take possession or to loot it. They certainly were very successful in their attack.

Q. Well, would you state that that attack, Governor, [525] did not constitute an invasion of the Territory?

Mr. Anthony: I object to that as a question of law.

The Court: Sustained.

Mr. Ennis: If the Court please, I have no further cross examination of the Governor, but if the Court would permit I would like to make the Governor our witness on a separate subject and ask him a few questions in order to prevent recalling the Governor.

The Court: You may do so. Is there any objection to the Respondent at this time making the Governor their witness?

Mr. Anthony: None whatsoever.

The Court: All right. You may proceed, then, upon that understanding, that the Governor is now your witness.

HON. INGRAM M. STAINBACK,

Governor of the Territory of Hawaii, being previously sworn, testified for the Respondent as follows:

Direct Examination

By Mr. Ennis:

Q. Governor, annexed to the return and answer are copies of your proclamation of February 8, 1943, and copies of correspondence between the Secretary of War, the Attorney General, the Secretary of the Interior, and the President of the United States. Are you familiar with that correspondence?

A. I am.

Mr. Ennis: May I have these documents on which the [526] cover sheet is dated March 31, 1944, marked for identification?

The Clerk: Respondent's Exhibit No. 5 for identification.

The Court: The Clerk will mark it for identification.

(Received and marked for identification Respondent's Exhibit No. 5.)

By Mr. Ennis:

Q. I show you Respondent's Exhibit 5 for identification, consisting of photostatic copies of draft of letter from the three cabinet members I just mentioned to the President, containing initials of the officials in the three departments interested, Interior, Justice and War, and annexed thereto a copy of the proposed proclamation of the Governor. Will you examine those photostats and state whether, ac-

(Testimony of Hon. Ingram M. Stainback.)

cording to your recollection, they appear to be correct copies of that draft initialed by the officers? (Handing witness photostats)

A. Yes, that seems to be a copy and that is the photostatic copy of my signature.

Q. That's a photostatic copy of your signature?

A. Under the word "approved."

Q. Yes. Do you recall the occasion upon which those other signatures were affixed to the original of this photostat, Governor?

A. In general, yes. In all this discussion it was emphasized by the War, the Attorney General, and the Interior that this matter should be settled without going to the President. He had burdens enough without taking up these other troubles. [527]

So I think every department exerted every effort to arrive at an amicable settlement that would in substance restore civil authority as much as we could get and also satisfy the War Department. So we reached a tentative agreement which is contained in the proclamation that is attached here, whereby most of the civil authority would be given to the civil Government, but certain authority, which is mentioned in the proclamation, would be retained by the military authorities. They thought it would be a good idea to have that approved by the President. So these letters were drafted with that idea in mind, and both myself—and I don't know whether I can read this signature—and Mr. Fortas——

Q. He's the Under-Secretary of the Department of the Interior.

(Testimony of Hon. Ingram M. Stainback.)

A. ——McCloy, I assume.

Q. John J. McCloy, the Assistant Secretary of War, Warner Gardner.

A. Solicitor of the Interior Department.

Q. And General Emmons?

A. And General Emmons signed this approval on the formal letter. I only examined the first. Maybe I had better look at the others.

Q. Yes, if you will, Governor.

A. This is from the President, the second letter in the exhibit is from the President addressed to the Secretary of War, and was also signed by me, and the other is approved. [528]

Q. That's an agreed draft which was submitted to the President?

A. Yes, submitted to the President.

Q. And the next, the third document, appears to be a photostat of the proposed proclamation by the Governor?

A. Yes. That was agreed to, but I have in my notes on here "substitute page 3 of the Army proclamation." Apparently there is some change on page three of the original draft. I don't know what it was.

Q. Well, I think for the present purposes, Governor, that it would be sufficient if you would state if that is one draft of the proclamation?

A. That is a draft.

Q. Which also contains the signatures you mentioned?

(Testimony of Hon. Ingram M. Stainback.)

A. Yes, the approval of the signatures mentioned.

Q. By comparison in the record we'll be able to work out the final proclamation.

A. Page three was changed.

Q. But it will appear in the final proclamation?

A. Page three was changed in both proclamations, both mine and the General's. I've got on mine "January 18, Mr. Gardner said 'substitute page 3 of the Governor's proclamation.'"

Mr. Ennis: I request that this be marked as Respondent's Exhibit 6 for identification, these several documents under a seal and certificate of C. Ingling, Chief of Files of the White House. [529]

The Court: It may be marked for identification.

(Received and marked Respondent's Exhibit No. 6 for identification.)

By Mr. Ennis:

Q. Governor, I request you to examine Respondent's Exhibit 6 for identification, which purports to be photostats of a letter dated February 1st, 1943, to Secretary Stimson from the President, but bearing a typewritten signature, and a letter of January 18th, 1943, photostat of a letter, bearing the actual signature, photostat of the signature of the Secretary of War, the Attorney General, and the Secretary of the Interior. Will you examine the letter of January 18th and state, according to your recollection, whether that appears to be a photostat of the letter from the three members of the cabinet to the

(Testimony of Hon. Ingram M. Stainback.)

President, enclosing a copy of your proposed proclamation of February 8th?

A. That is the same as the copy that I have, excepting that the copy that I have does not bear the signature of the Secretary of War, the Attorney General, nor the Secretary of the Interior.

Q. But the text is the same?

A. The text is the same as the one in my files, but it does not bear the signatures.

Mr. Ennis: I request that this be marked as Respondent's Exhibit 7 for identification.

The Court: It may be marked for identification.

[530]

Mr. Ennis: This is a document dated March 22, 1944, and affixed thereto by seal, a photostat of a letter dated February 1, 1943, bearing the photostat of the signature of the President to a letter to Secretary Stimson.

(Received and marked Respondent's Exhibit 7 for identification.)

Q. Governor, I request you to examine Respondent's Exhibit 7 for identification and will you state whether that appears to be a photostat of the letter from the President to Secretary Stimson but bearing a photostat of the President's signature? (Handling witness the exhibit)

Mr. Anthony: I might state, if the Court please, that there is no issue about this. There is no issue about the execution and delivery of these documents except an issue of relevancy.

(Testimony of Hon. Ingram M. Stainback.)

The Witness: This is the same as the letter in my file and bears the photographic copy of the signature of the President, and the letter in my file does not bear the signature of the President.

Mr. Ennis: I request that this be marked as Government's Exhibit 8 for identification, an agreed draft, photostat of agreed draft of a letter from the Governor of Hawaii, dated January 18, 1943, to General Emmons, under a certification of the War Department dated March 31, 1944. (Handing a photostat to the Court)

The Court: Let it be marked for identification.

[531]

(Received and marked Respondent's Exhibit 8 for identification.)

Q. Governor, I request you to examine Respondent's Exhibit 8 for identification and state whether or not it is a photostat of a letter from the Governor, yourself, to General Emmons, bearing under the word "approved" your signature and the signature of the other officials of the departments which appear in the other letters.

A. This is the photostat of the agreed draft that was arrived at in Washington. The letter was not written until I came back to Honolulu, and at the time I believe General Emmons had left quite some time prior to my leaving Washington.

Q. Was the letter in this form sent to either General Emmons or his successor in office?

A. It was sent to General Emmons.

(Testimony of Hon. Ingram M. Stainback.)

Q. It was? A. Yes.

Q. In this form?

A. Yes. I am not quite sure; I have nothing but the draft, but I am quite sure that such a letter was sent.

Mr. Ennis: If the Court please, a word of explanation. The opposing Counsel had not questioned the authenticity or the correctness of the copies of these original documents which are annexed to the answer and response, but I have marked these for identification and ask the Governor about [532] them because there are two purposes to be served: one, to prove the documents, which there is no objection to, and also to indicate by the signatures on the agreed draft that the three departments and the Governor worked on this problem and came to an agreement which is disclosed by their signatures on the drafts, which of course do not appear on the final letters.

Q. Now, Governor, are these documents the evidence of your consultations in Washington which culminated in your proclamation of February 8, 1943?

A. That is evidence of our agreement, yes.

Q. And they are an accurate statement of your agreement?

A. That is correct. Like all agreements, I might say that it is more or less of a compromise agreement.

Q. But they do express the sense of the agreement which was reached? A. That is true.

(Testimony of Hon. Ingram M. Stainback.)

Mr. Ennis: At this time, your Honor, I would like to offer in evidence Respondents' Exhibits 5, 6, 7 and 8.

The Court: Let me know the particular thing in the documents that you want to call the Court's attention to.

Mr. Ennis: I would like to call the Court's attention to the drafts of the letter from the three members of the cabinet to the President initialed by the officials concerned, and the draft of the President's reply, initialed by them, to prove to the Court that it was the intention and the agreement [533] of the Government departments concerned that the resulting proclamation of February 8, 1943, should, so far as the law permitted and so far as their intentions could accomplish, accomplish the continued suspension of the privilege of the writ and the continuation of martial law.

The final exchange between the three cabinet members and the President, which are not initialed, I offer as additional evidence of the intentions by the public officials concerned as to the meaning of the language of the proclamation itself, if there is any question about the language.

The Court: Do these documents which you have and offer to put in evidence contain a copy of the proclamation that was actually issued?

Mr. Ennis: Yes, your Honor, there is annexed to the letter sent to the President a copy of the proclamation in the form in which it was issued.

The Court: Is there any objection?

(Testimony of Hon. Ingram M. Stainback.)

Mr. Anthony: I have no objection to the authenticity of the letters your Honor, and I have no objection to the documents going in evidence, preserving the right to argue as to the relevance and the construction of this proclamation. The proclamation, like any other written instrument, shall be interpreted by the instrument itself. And whether or not martial law exists does not depend upon the proclamation, as Counsel knows. With that statement, I have no objection to them going in evidence.

[534]

The Court: The several exhibits offered are received in evidence as Respondent's Exhibit 5, marked 5-1, 5-2, etc. How many are there?

The Clerk: Four, your Honor.

(Respondent's Exhibit 5-1, 5-2, 5-3 and 5-4 received in evidence.)

RESPONDENT' EXHIBIT No. 5-1

United States (Cut) of America
War Department
Washington, March 31, 1944

I Hereby Certify that the attached copies of documents relating to governmental functions in the Territory of Hawaii, are true and exact photostatic copies made from official record on file in the office

(Testimony of Hon. Ingram M. Stainback.)

of the Assistant Secretary of War, War Department, Washington, D. C.

HARRISON A. GERHARDT
Harrison A. Gerhardt
Lt. Colonel, General Staff Corps Executive to Asst. Secretary of War

I Hereby Certify that Lt. Colonel Harrison A. Gerhardt, General Staff Corps, who signed the foregoing certificate, is the Executive to the Assistant Secretary of War, and that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof I, Henry L. Stimson, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 31 day of March, 1944.

[Seal] HENRY L. STIMSON
Secretary of War.
By J. C. COOK
Assistant Chief Clerk.

War Department
Form No. 7

(Testimony of Hon. Ingram M. Stainback.)

Agreed Draft

[In longhand]: File Copy
War Dept.

Dear Mr. President:

We are pleased to report that after lengthy discussions the Departments of War, Justice, and Interior have reached an operating agreement upon the distribution of governmental functions between the civil and the military authorities in the Territory of Hawaii.

Pursuant to this agreement the Governor of Hawaii and the Commanding General will issue simultaneous proclamations. Their effect is to leave unchanged the state of martial law and the suspension of the writ of habeas corpus, to restore to the civil government the majority of civil functions hitherto exercised by the military authorities, and to provide emergency powers for the military government. Copies of the proclamations are enclosed for your information.

We also enclose a draft of a letter which we suggest you might appropriately send to the Secretary of War. It is designed, as you will observe, to reassure the civilian Departments that there will

(Testimony of Hon. Ingram M. Stainback.)

be no unnecessary resumption of the restored functions by the military authorities.

Sincerely yours,

HENRY L. STIMSON
Secretary of War

Attorney General

Secretary of the Interior

Approved

WARNER W. GARDNER
INGRAM M. STAINBACK
[Illegible]
[Illegible]
[Illegible]

The President
The White House.

[In longhand]: Copy of entire set sent to C&R, OSW 1-22-43

[Typewritten in righthand margin]: X—President of the U. S. ~~ASW 370.8 Hawaii~~

Agreed Draft

1/18/43

[In longhand]: of letter from the President to the Secretary of War

[In longhand]: File Copy
War Dept.

My dear Mr. Secretary:

I have examined the proposed proclamation to be issued by the Commanding General, Hawaiian Department, and the proposed proclamation to be is-

(Testimony of Hon. Ingram M. Stainback.)

sued concurrently by the Governor of Hawaii. I understand that the Departments of War, Justice, and Interior have agreed in this manner to resolve the difficult questions surrounding the administration of government in the Territory of Hawaii.

I wish to congratulate all the Departments concerned in their cooperative and successful efforts to reach an amicable solution of the knotty problems involved. In an area of such strategic importance as the Hawaiian Islands in a time of active war in the Pacific, I can readily appreciate the difficulty in defining exactly the boundaries between civil and military functions. I think the formula which this proclamation applies meets the present needs.

I know that General Emmons will do all that he can, consistent with his military responsibility, to refrain from exercising his authority over what are normally civil functions. I am confident that the military and civil authorities will cooperate fully. If an occasion should arise on which, after consultation with the civil authorities, the Commanding General felt it necessary to take action under the provisions of paragraph 3, I should like to be informed of the circumstances under which such action was taken. I hope also that there will be a further restoration of civil authority as and when the situation permits.

Sincerely yours,

.....

[Six signatures illegible.]

Hon. Henry L. Stimson,
Secretary of War.

Approved

(Testimony of Hon. Ingram M. Stainback.)

Proclamation

U. S. Army

Headquarters, Hawaiian Department.

Honolulu, ..., 1943.

To the People of Hawaii:

I, Delos C. Emmons, Lieutenant General, United States Army, as Commanding General, Hawaiian Department, and as Military Governor of Hawaii, do hereby proclaim:

1. Full jurisdiction and authority are hereby relinquished by the Commanding General to the Governor and other officers of the Territory of Hawaii, to the courts of that territory, to the city and county of Honolulu, to other counties, to all other officers of the territory or other persons acting under its authority, to the United States District Court for Hawaii, and to the appropriate officers of the United States, to exercise such powers as may now or hereafter be vested in them respectively by law over the following matters and others necessarily related thereto:

(a) Control of prices

(b) Rationing of commodities among the civilian population

(c) Control of hospitals, medical personnel, and medical supplies

(d) Food production by and distribution of food among the civilian population

(e) Control of rents

(f) Control of transportation and traffic by land,

(Testimony of Hon. Ingram M. Stainback.)

except the movement of troops, military supplies and equipment, and except that the Commanding General may prescribe rules for the traffic during blackout hours

(g) Public health, sanitation, and prevention of disease among civilians

(h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations

(i) Judicial proceedings, both criminal and ~~civil~~, except:

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect of any act or omission certified by the Commanding General to be in the line of duty.

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the territory or in the United States District Court for Hawaii, as the case may be.

(Testimony of Hon. Ingram M. Stainback.)

(j) Control of imports for civilian consumptio and exports by civilians within allotments of to nage made by the Commanding General

(k) Censorship of mail from civilians in t territory

(l) Control of liquor and narcotics

(m) Schools and children

(n) The custody of alien property

(o) Collection and disposition of garbage, ash and other waste

(p) Banking, currency, and securities, provid that the Commanding General may prescribe t measures to be taken to prevent the enemy fro obtaining securities or money or realizing up them if he should obtain them

(q) Civilian defense activities, except that t Commanding General shall have jurisdiction prescribe the duties of the Civilian Defense Cor and to regulate and inspect their training

(r) Control of the supply, employment, hou wages, and working conditions of labor, except as (1) employees of the United States under the W Department or the Navy Department, (2) worke employed on construction and other projects und the War Department or the Navy Department, (stevedores and other workers employed on doc and dock facilities, and (4) employees of publ utilities. It is contemplated that the Commandi General and the Governor of Hawaii by mutu agreement will appoint a joint advisory committe which shall from time to time consult and advi

(Testimony of Hon. Ingram M. Stainback.)

with each of them with reference to labor matters in their respective fields.

2. The Commanding General, Hawaiian Department, is charged with responsibility for the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations. For such purposes he shall continue, so far as he deems the military security of the territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are transferred to civil authorities pursuant to paragraph 1 of this proclamation.

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it necessary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a military emergency, to resume such of the functions and jurisdictions as are hereby or may hereafter be transferred to the civil authorities, or to issue such additional military orders, after consultation with the Governor of the territory where civilian rights and the administration of the civilian government are affected, directing such action as in the judgment of the Commanding General may be required for the military security of the territory.

4. Neither this proclamation nor the revocation of orders announced in paragraph 5 hereof shall operate to invalidate any conviction, or any appli-

(Testimony of Hon. Ingram M. Stainback.)

cation of military orders to persons or activities, or any other action, which occurred prior to the effective date of this proclamation or such revocation.

5. This proclamation shall take effect thirty days after its date. Those parts of all military orders affecting the subjects enumerated in paragraph 1 hereof are hereby revoked effective thirty days after the date hereof.

DELOS C. EMMONS,
Lieutenant General, U. S. Army, Commanding
Military Governor of Hawaii.

Approved:

WARNER W. GARDNER
INGRAM M. STAINBACK
[Three signatures illegible]

By the Governor of Hawaii

A PROCLAMATION

Whereas, the Governor of Hawaii by his proclamation of December 7, 1941, placed the Territory of Hawaii under martial law, in exercise of his powers under section 67 of the Organic Act, which action was confirmed by the President of the United States on December 8, 1941; and

Whereas, a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended;

(Testimony of Hon. Ingram M. Stainback.)

Now, Therefore, I, Ingram M. Stainback, Governor of Hawaii, under the authority given by section 67 of the Organic Act, do hereby proclaim:

1. The Governor of Hawaii and the other civilian officers and agencies of the federal, the territorial and the local governments, will resume on the thirtieth day hereafter their respective jurisdictions, functions and powers, according to law, with respect to the following matters, and others necessarily related thereto:

(a) Control of prices

(b) Rationing of commodities among the civilian population

(c) Control of hospitals, medical personnel, and medical supplies

(d) Food production by and distribution of food among the civilian population

(e) Control of rents

(f) Control of transportation and traffic by land, except the movement of troops, military supplies and equipment, and except that the Commanding General may prescribe rules for the traffic during blackout hours

(g) Public health, sanitation, and prevention of disease among civilians

(h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations

(i) Judicial proceedings, both criminal and civil, except:

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary

(Testimony of Hon. Ingram M. Stainback.)

armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect of any act or omission certified by the Commanding General to be in the line of duty.

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the Territory or in the United States District Court for Hawaii, as the case may be.

(j) Control of imports for civilian consumption and exports by civilians within allotments of tonnage made by the Commanding General

(k) Censorship of mail from civilians in the Territory

(l) Control of liquor and narcotics

(m) Schools and children

(n) The custody of alien property

(o) Collection and disposition of garbage, ashes, and other waste

(p) Banking, currency, and securities, provided that the Commanding General may prescribe the

(Testimony of Hon. Ingram M. Stainback.)

measures to be taken to prevent the enemy from obtaining securities or money or realizing upon them if he should obtain them

(q) Civilian defense activities, except that the Commanding General shall have jurisdiction to prescribe the duties of the Civilian Defense Corps, and to regulate and inspect their training

(r) Control of the supply, employment, hours, wages, and working conditions of labor, except as to (1) employees of the United States under the War Department or the Navy Department, (2) workers employed on construction and other projects under the War Department or the Navy Department, (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities. It is contemplated that the Commanding General and the Governor of Hawaii by mutual agreement will appoint a joint advisory committee which shall from time to time consult and advise with each of them with reference to labor matters in their respective fields.

2. For the purposes of the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations, the Commanding General shall continue so far as he deems the military security of the Territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are resumed by civil authorities pursuant to paragraph 1 of this proclamation.

(Testimony of Hon. Ingram M. Stainback.)

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it necessary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a military emergency, to exercise such of the functions and jurisdictions as are hereby or may hereafter be resumed by the civil authorities, or to issue such additional military orders, after consultation with the Governor of the Territory where civilian rights and the administration of the civilian government are affected, directing such action as in the judgement of the Commanding General may be required for the military security of the Territory.

4. Nothing in this proclamation shall operate to invalidate any conviction, or any application of military orders to persons or activities, or any other action, which occurred or shall occur prior to the thirtieth day hereafter.

5. I call upon all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and spirit, such orders as the Commanding General may issue under this proclamation and during the continuance of the state of martial law.

(Testimony of Hon. Ingram M. Stainback.)

Done at Honolulu, Territory of Hawaii, this .... day of January, 1943.

INGRAM M. STAINBACK,
Governor of Hawaii.

Approved

WARNER W. GARDNER
INGRAM M. STAINBACK
[Three signatures illegible.]

[Endorsed]: Filed 4-7-44.

RESPONDENT'S EXHIBIT No. 5-2

I hereby certify that the attached are true photostatic copies of letters and accompanying papers on file in the White House Office.

C. E. INGLING,
Chief of Files,
The White House Office.

I hereby certify that C. E. Ingling, who signed the foregoing certificate, is Chief of Files in the White House Office.

M. C. LATTA
M. C. Latta
Executive Clerk,
The White House Office.

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

The White House
Washington

[Marginal notes]: (400) Hawaii F x161

[Stamped] Feb 1 1943

My dear Mr. Secretary:

I have examined the proposed proclamation to be issued by the Commanding General Hawaiian Department, and the proposed proclamation to be issued concurrently by the Governor of Hawaii. I understand that the Departments of War, Justice, and Interior have agreed in this manner to resolve the difficult questions surrounding the administration of government in the Territory of Hawaii.

I wish to congratulate all the Departments concerned in their cooperative and successful efforts to reach an amicable solution of the knotty problems involved. In an area of such strategic importance as the Hawaiian Islands in a time of active war in the Pacific, I can readily appreciate the difficulty in defining exactly the boundaries between civil and military functions. I think the formula which this proclamation applies meets the present needs.

I know that General Emmons will do all that he can, consistent with his military responsibility, to refrain from exercising his authority over what are normally civil functions. I am confident that the military and civil authorities will cooperate fully. If an occasion should arise on which, after consultation with the civil authorities, the Commanding

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

General felt it necessary to take action under the provisions of paragraph 3, I should like to be informed of the circumstances under which such action was taken. I hope also that there will be a further restoration of civil authority as and when the situation permits.

Sincerely yours,

FRANKLIN D. ROOSEVELT

Hon. Henry L. Stimson, x25
Secretary of War.

[In manuscript]: Copy sent to Interior & Justice
Copy for White House Files

January 18, 1943.

Dear Mr. President:

We are pleased to report that after lengthy discussions the Departments of War, Justice, and Interior have reached an operating agreement upon the distribution of governmental functions between the civil and the military authorities in the Territory of Hawaii.

Pursuant to this agreement the Governor of Hawaii and the Commanding General will issue simultaneous proclamations. Their effect is to leave unchanged the state of martial law and the suspension of the writ of habeas corpus, to restore to the civil government the majority of civil functions hitherto exercised by the military authorities, and to provide emergency powers for the military government. Copies of the proclamations are enclosed for your information.

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

We also enclose a draft of a letter which we suggest you might appropriately send to the Secretary of War. It is designed, as you will observe, to reassure the civilian Departments that there will be no unnecessary resumption of the restored functions by the military authorities.

Very sincerely yours,

HENRY L. STIMSON
Secretary of War
FRANCIS BIDDLE
Attorney General x10
HAROLD L. ICKES
Secretary of the Interior x6

The President,
The White House.

Proclamation
U. S. Army
Headquarters, Hawaiian Department.
Honolulu, ..., 1943.

To the People of Hawaii:

I, Delos C. Emmons, Lieutenant General, United States Army, as Commanding General, Hawaiian Department, and as Military Governor of Hawaii, do hereby proclaim:

1. Full jurisdiction and authority are hereby relinquished by the Commanding General to the Governor and other officers of the Territory of Hawaii, to the courts of that territory, to the city and county of Honolulu, to other counties, to all other officers of the territory or other persons acting under its

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

authority, to the United States District Court for Hawaii, and to the appropriate officers of the United States, to exercise such powers as may now or hereafter be vested in them respectively by law over the following matters and others necessarily related thereto:

(a) Control of prices

(b) Rationing of commodities among the civilian population

(c) Control of hospitals, medical personnel, and medical supplies

(d) Food production by and distribution of food among the civilian population

(e) Control of rents

(f) Control of transportation and traffic by land, except the movement of troops, military supplies and equipment, and except that the Commanding General may prescribe rules for the traffic during blackout hours

(g) Public health, sanitation, and prevention of disease among civilians

(h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations

(i) Judicial proceedings, both criminal and civil, except:

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect of any act or omission certified by the Commanding General to be in the line of duty.

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the territory or in the United States District Court for Hawaii, as the case may be.

(j) Control of imports for civilian consumption and exports by civilians within allotments of tonnage made by the Commanding General

(k) Censorship of mail from civilians in the territory

(l) Control of liquor and narcotics

(m) Schools and children

(n) The custody of alien property

(o) Collection and disposition of garbage, ashes, and other waste

(p) Banking, currency, and securities, provided that the Commanding General may prescribe the measures to be taken to prevent the enemy from obtaining securities or money or realizing upon them if he should obtain them.

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

(q) Civilian defense activities, except that the Commanding General shall have jurisdiction to prescribe the duties of the Civilian Defense Corps, and to regulate and inspect their training

(r) Control of the supply, employment, hours, wages, and working conditions of labor, except as to (1) employees of the United States under the War Department or the Navy Department, (2) workers employed on construction and other projects under the War Department or the Navy Department, (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities. It is contemplated that the Commanding General and the Governor of Hawaii by mutual agreement will appoint a joint advisory committee, which shall from time to time consult and advise with each of them with reference to labor matters in their respective fields.

2. The Commanding General, Hawaiian Department, is charged with responsibility for the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations. For such purposes he shall continue, so far as he deems the military security of the territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are transferred to civil authorities pursuant to paragraph 1 of this proclamation.

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it nec-

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

essary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a military emergency, to resume such of the functions and jurisdictions as are hereby or may hereafter be transferred to the civil authorities, or to issue such additional military orders, after consultation with the Governor of the territory where civilian rights and the administraton of the civilian government are affected, directing such action as in the judgment of the Commanding General may be required for the military security of the territory.

4. Neither this proclamation nor the revocation of orders announced in paragraph 5 hereof shall operate to invalidate any conviction, or any application of military orders to persons or activities, or any other action, which occurred prior to the effective date of this proclamation or such revocation.

5. This proclamation shall take effect thirty days after its date. Those parts of all military orders affecting the subjects enumerated in paragraph 1 hereof are hereby revoked effective thirty days after the date hereof.

DELOS C. EMMONS,
Lieutenant General, U. S.
Army, Commanding.
Military Governor of Hawaii.

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

By the Governor of Hawaii

A Proclamation

Whereas, the Governor of Hawaii by his proclamation of December 7, 1941, placed the Territory of Hawii under martial law, in exercise of his powers under section 67 of the Organic Act, which action was confirmed by the President of the United States on December 8, 1941; and

Whereas, a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended;

Now, Therefore, I, Ingram M. Stainback, Governor of Hawaii, under the authority given by section 67 of the Organic Act, do hereby proclaim:

1. The Governor of Hawaii and the other civilian officers and agencies of the federal, the territorial and the local governments, will resume on the thirtieth day hereafter their respective jurisdictions, functions and powers, according to law, with respect to the following matters, and others necessarily related thereto:

(a) Control of prices

(b) Rationing of commodities among the civilian population

(c) Control of hospitals, medical personnel, and medical supplies

(d) Food production by and distribution of food among the civilian population

(e) Control of rents

(f) Control of transportation and traffic by land, except the movement of troops, military supplies

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

and equipment, and except that the Commanding General may prescribe for the traffic during black-out hours

(g) Public health, sanitation, and prevention of disease among civilians

(h) Licensing of businesses, regulation of hours of business, and types of forbidden occupations

(i) Judicial proceedings, both criminal and civil, except:

(1) Criminal prosecutions against members of the armed forces. Members of auxiliary armed forces shall be included within the term "armed forces" after induction into the service and also before induction in respect of any act or omission certified by the Commanding General to be in the line of duty.

(2) Civil suits against members of the armed forces, as defined in subparagraph (1), in respect of any act or omission certified by the Commanding General to be in the line of duty.

(3) Criminal prosecutions for violations of military orders.

The Commanding General may waive the above exception with respect to any particular prosecution or suit, or any class of prosecutions or suits, thereby permitting such prosecutions or suits to be tried in the appropriate court of the Territory or in the United States District Court for Hawaii, as the case may be.

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

(j) Control of imports for civilian consumption and exports by civilians within allotments of tonnage made by the Commanding General

(k) Censorship of mail from civilians in the Territory

(l) Control of liquor and narcotics

(m) Schools and children

(n) The custody of alien property

(o) Collection and disposition of garbage, ashes, and other waste

(p) Banking, currency, and securities, provided that the Commanding General may prescribe the measures to be taken to prevent the enemy from obtaining securities or money or realizing upon them if he should obtain them

(q) Civilian defense activities, except that the Commanding General shall have jurisdiction to prescribe the duties of the Civilian Defense Corps, and to regulate and inspect their training

(r) Control of the supply, employment, hours, wages, and working conditions of labor, except as to (1) employees of the United States under the War Department or the Navy Department, (2) workers employed on construction and other projects under the War Department or the Navy Department, (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities. It is contemplated that the Commanding General and the Governor of Hawaii by mutual agreement will appoint a joint advisory committee

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

which shall from time to time consult and advise with each of them with reference to labor matters in their respective fields.

2. For the purposes of the defense of the Hawaiian Islands and for their preparation for use as a base for offensive operations, the Commanding General shall continue so far as he deems the military security of the Territory to require, to exercise full jurisdiction over all matters over which he now has jurisdiction except such as are resumed by civil authorities pursuant to paragraph 1 of this proclamation.

3. Whenever the Commanding General, in the light of an existing military emergency or in anticipation of any military emergency, considers it necessary for the security of the islands or their use as a military or naval base, he shall have power, upon a written declaration of the existence or the anticipation of a military emergency, to exercise such of the functions and jurisdictions as are hereby or may hereafter be resumed by the civil authorities, or to issue such additional military orders, after consultation with the Governor of the Territory where civilian rights and the administration of the civilian government are affected, directing such action as in the judgment of the Commanding General may be required for the military security of the Territory.

4. Nothing in this proclamation shall operate to invalidate any conviction, or any application of mili-

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-2—(Continued)

tary orders to persons or activities, or any other action, which occurred or shall occur prior to the thirtieth day hereafter.

5. I call upon all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and spirit, such orders as the Commanding General may issue under this proclamation and during the continuance of the state of martial law.

Done at Honolulu, Territory of Hawaii, this .... day of January, 1943.

INGRAM M. STAINBACK,
Governor of Hawaii.

[Endorsed]: Filed 4-7-44.

RESPONDENT'S EXHIBIT No. 5-3

United States (cut) of America
War Department
Washington, 22 March, 1944

I hereby certify that the attached copy of letter from the President, addressed to the Secretary of War, dated February 1, 1943, is a true and exact photostat copy made from an official record on file in this office.

H. A. GERHARDT
Harrison A. Gerhardt
Lt. Colonel, General Staff Corps, Executive to Ass't Secretary of War

(Testimony of Hon. Ingram M. Stainback.)

I hereby certify that Lt. Colonel Harrison A. Gerhardt, who signed the foregoing certificate, is the Executive Officer to the Assistant Secretary of War, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof, I, Henry L. Stimson, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 22 day of March, 1944.

[Seal] HENRY L. STIMSON,
Secretary of War.
By J. C. COOK,
Assistant Chief Clerk.

War Department
Form No. 7

[Stamped]: Received War Department Secretary's Office 1943 Feb 2 AM 11:22

The White House
Washington
February 1, 1943

My dear Mr. Secretary:

I have examined the proposed proclamation to be issued by the Commanding General, Hawaiian Department, and the proposed proclamation to be issued concurrently by the Governor af Hawaii. I understand that the Departments of War, Justice, and Interior have agreed in this manner to resolve

(Testimony of Hon. Ingram M. Stainback.)

the difficult questions surrounding the administration of government in the Territory of Hawaii.

I wish to congratulate all the Departments concerned in their cooperative and successful efforts to reach an amicable solution of the knotty problems involved. In an area of such strategic importance as the Hawaiian Islands in a time of active war in the Pacific, I can readily appreciate the difficulty in defining exactly the boundaries between civil and military functions. I think the formula which this proclamation applies meets the present needs.

I know that General Emmons will do all that he can, consistent with his military responsibility, to refrain from exercising his authority over what are normally civil functions. I am confident that the military and civil authorities will cooperate fully. If an occasion should arise on which, after consultation with the civil authorities, the Commanding General felt it necessary to take action under the provisions of paragraph 3, I should like to be informed of the circumstances under which such action was taken. I hope also that there will be a further restoration of civil authority as and when the situation permits.

Sincerely yours,

FRANKLIN D. ROOSEVELT

Hon. Henry L. Stimson,
Secretary of War.

[Endorsed]: Filed 4-7-44.

(Testimony of Hon. Ingram M. Stainback.)

Respondent's Exhibit No. 5-4

United States [Cut] of America

War Department

Washington, 31 March 1944

I Hereby Certify that the attached copy of letter dated 1/18/43, relative to proclamations pertaining to governmental affairs in the Territory of Hawaii, is a true and exact photostatic copy made from an official record on file in the office of the Assistant Secretary of War, War Department, Washington, D.C.

HARRISON A. GERHARDT
Harrison A. Gerhardt
Lt. Colonel, General Staff Corps
Executive to Asst. Secretary of War

I Hereby Certify that Lt. Colonel Harrison A. Gerhardt, General Staff Corps, who signed the following certificate, is the Executive to Assistant Secretary of War, and that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof, I, Henry L. Stimson, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name

(Testimony of Hon. Ingram M. Stainback.)

to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this thirty-first day of March, 1944.

[Seal] HENRY L. STIMSON
Secretary of War.

By J. C. COOK
Assistant Chief Clerk.

War Department
Form No. 7

[Penciled in margin]: File Copy W 370.8
Hawaii X. Emmons 1-18-43

Agreed Draft

My dear General Emmons:

As you have doubtless been informed by the Secretary of War, an agreement has been reached in Washington which calls for the simultaneous issuance of similar proclamations by you and by me. I understand that you have received from the Secretary of War both the proclamation which you are to issue and a copy of that which I am to issue. I suggest that we confer at your earliest convenience as to the date and the manner of issuance of these proclamations.

I undertook when in Washington to add by informal letter a particularization of my intentions as to several of the general provisions of the proclamations. These matters are:

1. Although, by paragraph 1(g) of the proc-

(Testimony of Hon. Ingram M. Stainback.)

lamations, control of "public health, sanitation, and prevention of disease among civilians" is restored to the civil government, I shall put into effect any measure which you determine to be necessary to prevent contamination by the enemy.

2. Paragraph 1(b) of the proclamations restores to the civil government control of "rationing commodities among the civilian population." In the administration of these functions, the civil authorities will respect any determination which you might make as to necessary reserves of food-stuffs, both as to amount and as to kind, which are to be held against an emergency.

Sincerely yours,

Governor of Hawaii.

Approved

WARNER W. GARDNER
INGRAM M. STAINBACK
W. FORTAS
[Illegible]
D. C. EMMONS

[Endorsed]: Filed 4-7-44.

By Mr. Ennis:

Q. Governor, in connection with your proclamation of February 8, 1943, is it your understanding of the language you used that it was to continue the suspension of the privilege of the writ so far

(Testimony of Hon. Ingram M. Stainback.)

as the officials concerned could do that under the law?

Mr. Anthony: Same objection, your Honor.

The Court: Read that question, Mr. Reporter.

(The Reporter read the question.)

Mr. Anthony: May I state to your Honor, I have no objection to the witness answering the question so long as it is perfectly understood that this is a question of law for this Court. That is the meaning of the proclamation; that we are at liberty to address your Honor as to what the proclamation means.

The Witness: Shall I answer that?

The Court: Overruled. You may answer.

The Witness: There is no question, we intended to continue to suspend the writ of Habeas Corpus for the time being. Naturally, I didn't expect to continue it indefinitely, because [535] in the statement of the General at that time he said they would gradually relinquish civil control as it could be taken up; but as far as the proclamation was concerned, there is no question as to what was in our minds at that time. Whether he expressed it artistically or purposely, I presume it is a question for the Court. But as far as my own question was concerned, we intended to keep the right suspended.

Q. And at the time you issued your proclamation, Governor, you made a public statement to that effect? A. Yes, I think I did.

Mr. Ennis: Your Honor, that is all the exami-

(Testimony of Hon. Ingram M. Stainback.)

nation I have of the Governor as the Respondent's witness. But I would for a moment like to go back to one question on the cross-examination, with your Honor's permission, unless Counsel has some cross-examination on this phase of the case.

The Court: You may do that, but before you leave this subject I want to get my mind clear as to what happened. I haven't examined these documents that were put in. I had no opportunity to do so. I have heard a statement of Counsel as to what they contained in substance. As I get it, Governor, in Washington you conferred with executives of the National Government, department heads of the Interior, officials at least of the Interior and the Department of Justice and War as to the subject of martial law and the suspension of the writ of Habeas Corpus here.

The Witness: Yes, your Honor. [536]

The Court: And after discussions you were not altogether in accord but you did come to an agreement, an understanding, a workable agreement, as you believed, and that was largely for the purpose of obviating the need of carrying the matter to the President for settlement, is that correct?

The Witness: That is true. Maybe I had better go back a little bit. I went back to Washington definitely for the purpose of obtaining the revocation of martial law. Under the Organic Act, the Governor declares martial law, but it contains approval of

(Testimony of Hon. Ingram M. Stainback.)

the President. I don't know what the law is on revocation, but I assume it is the same way: the Governor revokes it with the approval of the President. So my purpose in going to Washington—in fact, the matter had been discussed before my appointment as Governor—and I went back to obtain the revocation of martial law. I obtained part of it but not all of it. And this was a matter that they did not want to take to the President. All departments felt that he was heavily burdened at that time, and I think it was just before he went to Africa—I am not sure—but they didn't want to take departmental matters to him, and that they should be settled by the various departments.

This is the best settlement I could get, and I believe the Justice Department was aiding and abetting me at that time instead of the General. The War Department was adamant and they would not yield further than they did yield.

The Court: The War Department wanted martial law and [537] the suspension of the writ to prevail.

The Witness: That's right.

The Court: The Department of the Interior, what was their position?

The Witness: They wanted to revoke martial law entirely. Mr. Ickes was rather emphatic, although he didn't continue in many of the conferences, mostly the Attorney General and myself and Mr. McCloy.

(Testimony of Hon. Ingram M. Stainback.)

The Court: The Department of Justice was neutral?

The Witness: The Department of Justice, as I take it, were very much in favor of me, that is, I say "me" in my position, and expressed it rather forcefully in several of the meetings but apparently they couldn't persuade the War Department.

The Court: You had several discussions?

The Witness: Oh, we went from early December until, I think—this is dated the 20th of January (referring to notes)—and almost daily discussions, quite drawn-out. And after we had arrived at one settlement—not a settlement but a tentative agreement—then apparently this labor problem came up. And General Emmons returned to Hawaii and we had to go through the cable off and on as to what the General approved, and that took most of January, very extended discussions, very long, drawn-out, and I think everybody kept their temper more or less and discussed it good-naturedly with the idea of solving a very difficult problem. [538]

The Court: Well, the difficult problem was an economic problem here, as to labor?

The Witness: I say difficult problem, the difficulty was the stand of the War Department, and, as I understand, also the Navy Department, although the Navy Department took no part in these negotiations at all. But I think the War Department ascertained the wishes of the Navy Department. I understand they were very strongly of the opinion

(Testimony of Hon. Ingram M. Stainback.)

that labor should be controlled by the War Department or by the military, I should say, and that martial law should be continued in some form. In fact, I am quite sure the Navy Department was very much of that opinion.

The Court: Well, as a matter of practical expedience and convenience, is that it?

The Witness: To a large extent. And the matter of facing conditions here and adjusting ourselves here to conditions after having been under military government for a year, the question of upset of economic conditions of the Territory had to be very carefully looked into, and a great many matters of that sort. We didn't want to throw a monkey wrench into the existing set-up and disorganize the Territorial economic conditions any worse than that.

The Court: Well, during these discussions was the matter of the Constitutional provision that the Writ of Habeas Corpus shall not be suspended except during times of rebellion or invasion considered and discussed? [539]

The Witness: I don't think we went into any particular discussion of the legal end. It was a question of arriving at a practical settlement of an existing condition, and there was not much discussion of the law except at the first meeting, I think, the Attorney Genreal gave his opinion on the law, on some phases of it. But after that it was mostly this question of what the War Department deemed absolutely necessary for the protection of the Islands. I'll put it that way rather than the

(Testimony of Hon. Ingram M. Stainback.)

question of legality or matters of that sort; very little, in fact I think there was no discussion of law after the first meeting.

The Court: Well, was there any understanding as to how long that agreed arrangement should continue?

The Witness: Well, the very emphatic statement was made by General Emmons that he didn't want to exercise any civil powers and he certainly would get rid of all of it as quickly as he could with safety to the community, and we were all rather under the impression that very shortly the whole set-up would be abandoned—at least I was. I don't know what the impression of the Attorney General was, and others. Direct reference was made to part of that, that they would give it up later that is, the term Military Governor. And the Attorney General pointed out in the first meeting that there was no such thing in an American community, no such thing as Constitutional Government that applied to belligerant government. [540]

There was some statement made after we agreed. General Emmons wanted to retain that title for some reason or another for awhile. I opposed that because I said that Hawaii was an integral part of the United States and shouldn't be treated like a conquered country or a country in rebellion. The Attorney General argued with me and said: "What do you care what it calls itself?" Well, I said: "As long as the President doesn't recognize it, there is no official recognition; he can call himself

(Testimony of Hon. Ingram M. Stainback.)

Emperor Jones, as far as he wishes, as far as I'm concerned." So you will note in the letter the President addresses him as "Commanding General."

That's the only thing where they said it would be definitely dropped in a short time. The others would be dropped as quickly as it could be with safety to the Territory.

The Court: This proclamation that you promulgated on February 8, 1943, did you draw that or did your Attorney General draw it?

The Witness: That was a proclamation that was agreed to in Washington drawn mostly by Mr. Gardner of the Solicitor's Department and Mr. McCloy, I think, of the War Department; a good many others sitting in from time to time, but as draftsmen, I believe they were. Probably some attorney knew more about it, but I don't know whether Mr. McCloy attended all of the conferences. Mr. Gardner, when the proclamation began to take final form, was the chief draftsman at that time. So that was all agreed upon before I came back. I simply copied [541] the agreed form after my return to the Territory.

The Court: You brought the proclamation back with you?

The Witness: Yes, a draft of it.

The Court: How much time had elapsed between the time when you were helding these conferences and joined in the departmental agreement there before the proclamation was issued?

(Testimony of Hon. Ingram M. Stainback.)

The Witness: I left Washington in the latter part of January. I think these letters were dated the 18th or 20th. The proclamation was issued soon after my return, on the 8th of February, I believe is the date of it.

The Court: That's all.

Mr. Ennis: I have nothing more on this phase of the Governor's testimony.

The Court: Now, there were one or two questions that you wanted to revert to.

Mr. Ennis: Yes, unless you have some cross-examination on this phase.

Mr. Anthony: I'll take my redirect and cross at the same time. Go ahead.

HON. INGRAM M. STAINBACK,

Governor of the Territory of Hawaii, being previously sworn, testified for the Petitioner as follows:

Cross-Examination
(continued)

By Mr. Ennis:

Q. Governor, on your direct examination by Mr. Anthony [542] you testified that it was your opinion that there was no danger of invasion, imminent danger of invasion at this time?

A. That is correct.

Mr. Ennis: Now, at this time, with your Honor's permission I would like to repeat my question

(Testimony of Hon. Ingram M. Stainback.)

and request that the witness be allowed to answer the question as to whether, in his opinion, there was an invasion on December 7, 1941. Now, your Honor has already sustained an objection to that question, but I would like to make the point that the witness be allowed to testify as to his opinion as to the present time.

The Court: Yes, all right, you may ask that question.

The Wieness: I don't think there is any comparison between December 7, 1941, and the present. I talked to a great many officers, Army, Navy and Marine, a great many.

Q. I understand, Governor.

A. May I finish my answer in this way? At the present time I know there are certain submarines in these waters here to seek information.

Q. Well, now, Governor, I don't wish to interrupt you but I do think, your Honor, that the particular question is whether or not in the Governor's opinion—and he has told us what he has observed on December 7th—whether or not there was an invasion on that day? And if I may, I'd like to have that particular question answered. [543]

The Court: That largely runs to the question as to what the Governor considers the meaning of the term invasion. He has used that term in saying that he was quite sure there was no imminent danger of invasion now. And you are asking him if there was an invasion of the islands on Decem-

(Testimony of Hon. Ingram M. Stainback.)

ber 7, 1941. I think the question is fair. You may answer.

A. I have talked to and I do not disagree with the Admiral and the General. Of course, you can take out the weasel words. I think what they mean is that we have submarines here now.

Mr. Ennis: Well, your Honor, I object to what the Admiral's and the General's views are. I think we ought to get an answer to the question of what the Governor's opinion is on whether or not there was an invasion on December 7th.

A. I've got to explain that. Today there is no possibility of a repetition of December 7th.

Mr. Ennis: If your Honor please, I request that that answer be stricken as not responsive to the question of whether or not there was an invasion on December 7th.

The Court: I think the witness should be allowed to express it in his own way, to answer the question as to whether he considers there was an invasion December 7th.

A. In comparing it with today, I have to take it today; today I understand air raids can be made.

Mr. Ennis: I renew my objection, your Honor; the answer is not responsive. [544]

The Court: It may be. If it isn't at the finish, we will entertain a motion to strike.

Mr. Ennis: I take exception, please.

A. But because of our complete protection by antiaircraft today, I think any expert will agree

(Testimony of Hon. Ingram M. Stainback.)

the planes will be kept at such a height—they can come in but they could not get any targets with any accuracy like they did on December 7th. So, as far as I am concerned, you can consider December 7th invasion, and yet I still say there is no imminent danger of invasion today because they could not possibly have a repetition of coming right in on top of the targets with the planes that came in December 7th. Of course, we thought there was invasion on December 7th. There was a radio announcement that paratroopers were landing here, there, and everywhere else. But as to whether that constitutes invasion, I don't think there could be any repetition of that, and I think any officer that knows anything about our air protection here will tell you that the planes might get in but they will be kept at such altitudes that they could not possibly deal with any accuracy on targets in the Territory. I have that on the very highest authorities from numerous sources.

So regardless of whether that was an invasion or not, I don't think that invasion could occur today. I don't know whether I am making myself clear but I've got to make that comparison to say now that I still maintain that there couldn't [545] possibly be any imminent danger of invasion today.

Q. Well, now, Governor, do I understand that your answer to my question is that there was an invasion on December 7, 1941?

A. I am not prepared to pass on the legality of

(Testimony of Hon. Ingram M. Stainback.)

whether the Court would hold that as invasion or not. My description of invasion is where troops land to take possession. And from that stand point I don't think there is the slightest danger of invasion. I think that there possibly may be, from all the people that I talked to, a raid, that is, a bombing of this Territory. It could be done; they couldn't stop it; they do it in London. if they are willing to make the sacrifice. But they would be kept so high that there could be no accuracy of bombing, and probably most of the bombers would come to grief. I understand we are very heavily fortified here in that respect.

Q. Well, of course, Governor, I understand your view as to the situation today. I apppreciate that. But what I wanted, if I could get it, was an answer to the question of whether or not, in your view, there was an invasion on December 7, 1941?

A. I would say there was imminent danger of invasion at that time, and I would have certainly declared martial law. I wouldn't think it would be necessary to pass on the legal problem whether there was a technical invasion or not. [546]

Q. Well, apart from the legal problem, which I am sure the Court will deal with adequately—the statute, Section 67, uses the words "invasion or imminent danger thereof"—now, couldn't you express an opinion as to whether what you observed——

A. I would request the Attorney General to express an opinion on the legality, but I certainly would declare martial law on the prime situation

(Testimony of Hon: Ingram M. Stainback.)

that we had imminent danger there. I wouldn't argue on the question of splitting hair as to whether we were invaded or not.

Q. Well, Governor, I don't ask you for a legal opinion.

A. I was not Governor at that time and I did not in any way pass on the question. If it would come before me in Court, I might have passed on it, but I hadn't taken testimony. But I would sustain it if I had been Governor, I would sustain it on the question of imminent danger.

Q. But on the question of invasion and imminent danger thereof, that is not only a legal question but in any community and to a Governor it is more vitally a factual question. Couldn't you answer from what you observed and from what you know, living in the community and being a Federal Judge, as to whether or not there appeared to be an invasion on December 7th?

A. It certainly appeared to be invasion. And it happened. There is no question about that. We certainly acted on that assumption. [547]

Q. Wouldn't you say there was an invasion?

A. Actually it turned out there was no invasion but just the sinking of our fleet.

Mr. Ennis: That is all. Thank you.

Redirect Examination

By Mr. Anthony:

Q. Governor, your views as to the imminence of invasion and the requirement that the privilege of the Writ of Habeas Corpus be suspended, they

(Testimony of Hon. Ingram M. Stainback.)

have been the same for the year 1943 and the entire year 1944? A. Yes.

Q. In our direct examination by Mr. Ennis in regard to the proclamation, you made reference to relinquishment of civil authority. That was agreed upon and so expressed in the document?

A. Yes, it was agreed that gradually there would be relinquished civil authority to the civil government.

Q. From and on March 10, 1943, what has been the course of events?

A. Nothing has been relinquished as far as I know, and we have taken no action. I have conferred with General Richardson a couple of times to try to get a working agreement. I might state, your Honor, we haven't been having any fights over this situation. I don't want to appear—General Richardson and I are on the friendliest terms and I try to cooperate with him, [548] and I am sure he has tried to cooperate with me, and my suggestions in Government have been as much to aid him as to aid the people of the Territory. I'm probably put in a little false position here on some of these answers and questions.

Mr. Anthony: No further questions.

Mr. Ennis: Well, I think perhaps I should state, as the Governor did, that my department, the Department of Justice, and the Attorney General, we want to make it perfectly clear that whatever our obligations are as an administrative department of the Government in helping work these things out

(Testimony of Hon. Ingram M. Stainback.)

administratively, of course my position here, as a representative of the Attorney General, is to defend any Federal Government officials who are sued by a private party; and with the Governor I merely wanted to bring out as clearly as I could the actual facts of the matter. And I think that the Governor will agree that the Department of Justice and the Department of the Interior work very closely together on these matters, and on administrative matters—we deal very closely on them. But when any Federal official is sued, indeed, if the Governor is sued in connection with some other aspects of this matter, we might very well in defending him take a position somewhat different from the position we now take. But we defend every department of the Government. I think in cross-examining the Governor that it is fair that I should state that on the record. I think the Governor understands that. [549]

The Witness: I have no kick, Mr. Ennis. I'm glad to hear you defend me if I get in trouble.

The Court: I think that is all.

(Witness excused.)

The Court: We'll take a recess at this time.

(A recess was taken at 10:31 a.m.) [550]

After Recess
(10:50 a.m.)

Mr. Ennis: May we proceed?
The Court: Yes.

ROBERT ROAN,

a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Will you state your full name and your occupation?

A. My full name is Robert Roan. I'm Police Sergeant, Navy Yard Police Department.

Q. Were you on duty on the night of February 24th, 1944, at 10:00 p.m.? A. Yes, I was.

Q. Where?

A. I was in the housing area, one and two.

Q. Will you state in your own words the circumstances under which you talked to and observed Corporal Bowerman of the Marine Corps at the Pearl Harbor gate?

Mr. Anthony: I object to this as incompetent, irrelevant and immaterial, your Honor; and at this time I would like to raise the question to the Court as to the admission of a large amount of wholly irrelevant testimony in this case, and I now move to strike it, namely, the testimony of Corporal Bowerman, the Provost Court reporter, and any other witness as to that transaction. That [551]

(Testimony of Robert Roan.)

evidence, in my judgment, has no place in a habeas corpus proceeding at all. The only thing that is in issue here is the jurisdiction of the Provost Court. And I would like to argue that at length in this Court, as to whether or not that evidence should be in this case.

The Court: Well, I understood that there would probably be a motion made by the Respondent to strike certain of your evidence along those same lines. I had thought that we might take that up at some convenient time, any time convenient to both of you. I'd like to hear you on it. Now, this doesn't seem to be appropriate just at this instance. You combined two matters there together.

Mr. Anthony: Very well, your Honor, so long as I may still be at liberty to strike that evidence and argue fully before your Honor on that subject.

The Court: Read the question.

(The Reporter read the last question.)

The Court: Just a minute. I don't see the materiality or the relevancy of that.

Mr. Ennis: Well, your Honor, this line of testimony was only offered after witnesses called by the Petitioner, including Weities, were called, over the Government's objction, to testify as to what occurred on this occasion. Now, I think that the record contains the Petitioner's view of what occurred on that occasion, and that the Respondent should be allowed by other witnesses to show what occurred on that occasion. I have only a couple of questions to [552] ask the officer.

(Testimony of Robert Roan.)

The Court: Well, you may go ahead, but I am almost convinced that all that line of evidence should come out.

Mr. Ennis: I will make it very brief, your Honor. (To witness): Will you answer that?

The Court: Subject to a motion to be struck then. Go ahead.

The Witness: Well, on arriving at the main gate during this call for the scuffle, when I arrived there I asked Corporal Bowerman what the trouble was, and I noticed he had a handkerchief in his hand and he was holding it to his mouth, and he said somebody had slugged him, and this man on the bench——

Mr. Anthony: Additional evidence is hearsay, and I move to strike the witness' testimony.

The Court: Sustained.

Mr. Ennis: Will you just tell us, Officer Roan, what you saw on that occasion? You saw Corporal Bowerman standing with a handkerchief, with his lip bleeding?

A. Yes, sir, I saw Corporal Bowerman.

Q. What else did you see?

A. And I saw he had a lump over one eye; I think it was his left eye; and I told him why he didn't go to the dispensary, and he said he'd have to wait until the Civil Police came, and——

Mr. Anthony: Just a minute. I object to the hearsay testimony and ask that it be stricken.

Mr. Ennis: Officer Roan, don't state what somebody else said; just what you saw and whom you saw and what you said.

(Testimony of Robert Roan.)

A. Well, after I saw Corporal Bowerman I saw this workman [553] sitting on this bench.

Q. Do you see him in Court, the one you saw?

A. Yes.

Q. Will you point him out?

A. This one. (Indicating Petitioner.)

Q. The Petitioner sitting at the table here?

A. Yes, sir. Well, when I found out what the trouble was, I asked for the man's badge and his name, and he gave me his name and his badge. And when he was going to turn this badge to me, this workman got up and started to grab for the badge, and I said, "You sit down and I'll take care of the badge." And he said, "All right, Sergeant, being as you're going to take it, I'll sit down." And he sat down. So I called the Sergeant on duty of the Guard to come with the wagon and take him to the yard.

Q. You did? A. Yes, sir.

Mr. Ennis: That's all.

Mr. Anthony: You got the badge?

The Witness: Yes, sir.

Mr. Anthony: That's all.

(Witness excused.)

Mr. Anthony: I think the record should show, your Honor, that all of these witnesses that have been testifying have been in the Courtroom during the other testimony and during the hearing on this case.

Mr. Ennis: On both sides. Counsel discussed it,

and as far as we were concerned, we had no objection. [554]

The Court: Very well, there has been no ruling asked for.

JAMES C. HUNTER,

Private First Class, U.S.M.C., a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Will you state your full name and present occupation?

A. James C. Hunter. I'm a sentry at the main gate.

Q. Main gate where?

A. At Pearl Harbor.

Q. You are in the Marine Corps?

A. That's right, sir.

Q. How long have you been a sentry at the main gate?

A. Since last July; it will be a year this July.

Q. It will be a year this coming July?

A. That's right, sir.

Q. What are your duties there?

A. To check identifications coming into the yard and to take cameras and liquor or anything that isn't allowed to come into the yard, to check it, pick it up.

Q. Speak louder.

A. Pick up property passes leaving the yard,

(Testimony of James C. Hunter.)

people taking property out of the yard and having authorization to take it out, why to be picked up, to see to that, to keep order.

Mr. Anthony: You'll have to lift up your voice.

[555]

A. To keep order in the section.

Q. You were a witness at the Provost Court trial of Lloyd Duncan on March 2, 1944?

A. Yes, sir.

Q. I show you Respondent's Exhibit 1 in evidence and ask you to examine the transcript of your testimony on that occasion, which it purports to contain. Will you read that and then tell the Court whether that is a complete and accurate transcript of your testimony as you recall it? Just read it and take your time. (Handing witness a typewritten document.)

A. Yes, sir, that is the statement I made out.

Q. Is that a complete statement of the testimony you gave? A. That's right, sir.

Q. And it is an accurate statement?

A. Yes, sir.

Mr. Anthony: My objection runs to that entire line, is that understood, subject to the motion to strike?

The Court: Yes.

Q. Now I request you to examine Duncan's own testimony and state whether, according to your best recollection, that is a complete and accurate statement of what he said?

A. Yes, sir, it is the same statement as he made.

(Testimony of James C. Hunter.)

Q. Is that a complete and accurate statement of what he said, as you recall it? A. Yes, sir.

Q. Going back to the incident itself on the evening of [556] February 24th—and, of course, your Honor, subject to the motions which both sides have now suggested in respect to the testimony about the incident—will you state briefly to the Court, as you recall it, what happened at that time. And lift your voice up so we can hear you.

A. Well, I was checking automobiles that entered the yard, and this Duncan and Weities and Bowerman were standing beside me and they were arguing about transportation to Weities' ship. And this Duncan come over and asked me what he was going to do with Weities, and I told him that I didn't have time to talk to him, that Bowerman would handle it. And I went ahead checking the cars coming into the yard. And then the next thing I knew they were scuffling over there. Bowerman put him under arrest, and asked him for his badge, and Duncan told him he didn't have to give him his badge. And so Bowerman reached up to take his badge, and Duncan took a swing at him, and this is when I went over. And Bowerman grabbed a hold of his arm and I went over and took hold of his other arm, and we set him down. And Duncan, while he had a hold of him, Duncan loosed one arm.

Q. I don't hear you.

A. While we had a hold of him, Duncan broke loose with one of his arms and struck Bowerman,

(Testimony of James C. Hunter.)

and he was kicking when he was sitting him down; he kicked me in the shins and hit me on the face.

Q. He struck whom a blow on the face?

A. He struck me a light blow with his arm, and he struck Bowerman I don't know how many times. [557]

Q. Did you see any of the effects of the blows he struck Bowerman?

A. Yes, sir. Bowerman had a gash under one of his eyes, and his lips were swollen, his lips were bleeding. So Bowerman went in to call a civilian, to call the civilian cops, and while he was calling civilian cops he told me to stay there and watch him. And while I watched him I was away from my post as a regular sentry, and Bowerman called this civilian cop and Duncan started swearing and saying he was going to kill us. So Bowerman brought out his club and he told him to be quiet, and Duncan sat down and he never said nothing else. We moved him over on the side and the civilian cops came then. That's about all.

A. That's about all? A. Yes.

Mr. Ennis: That's all.

Cross-Examination

By Mr. Anthony:

Q. Did Bowerman hit Duncan with a club?

A. No, sir.

Q. What did he do, just shake the club?

A. No, he picked up the club and came over towards him, and he never got within five feet of Duncan outside of the shack. The shack was closed

(Testimony of James C. Hunter.)

with glass and Duncan was sitting in the bench adjoining the shack where the glass is.

Q. Did you tell that to the Provost Court? [558]

A. I'm not sure whether I did or not, sir.

Q. You testified down at the Provost Court that Bowerman had a cut lip and a black eye, did you?

A. I don't think I did. I don't know whether they asked me or not. If they did, I probably did.

Q. Well, now, I'm asking you what you testified to?

A. I'm not sure whether I said that or not. I'm not sure.

Q. You're not sure whether you testified to that?

A. I testified that he did strike Bowerman.

Q. But how about the black eye and the bleeding lip?

A. He had no black eye but he had a gash under his eye.

Q. And you testified to that? A. Yes, sir.

Q. And you testified to the bleeding lip?

A. No, I never said anything about a bleeding lip, I don't believe.

Mr. Anthony: That's all.

(Witness excused.)

GENE A. TRINI, Lieutenant, U. S. Navy,

a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Will you state your full name and occupation?

A. Gene Trini, Legal Aid to the Captain of the Yard and Provost Prosecutor of the Navy Yard.

[559]

Q. Navy Yard at Pearl Harbor?

A. Yes, sir.

Q. Lieutenant Trini, you were the Prosecutor—— A. In this Duncan case.

Q. In the Provost Court Duncan case with which we are concerned here? A. Yes.

Q. Do you recall a conversation with the Petitioner's brother after the prosecution?

A. Yes.

Q. Will you state the substance of that conversation as you recall it?

A. Well, he came into the Courtroom and I was called by the Court Clerk to meet Mr. Duncan, the smaller of the two who came in to visit me. And we discussed—he asked me the question of the possibility of having the case reviewed and as to the facts of the case, and so we talked back and forth about the case.

Q. Was that before or after the trial?

A. That was after the trial, I imagine about a week after the trial. He asked me about the evi-

(Testimony of Gene A. Trini.)

dence and the facts, and if there was any possible chance of getting the case reversed, etc. And I told him on the facts I thought not, that the case was presented and that the Judge decided there would be just like a jury deciding on a question of facts and they would not be overturned unless they could find out that it was against the preponderance or the weight of the evidence, or something about that sort. And [560] then he said about the possibility of the right of attorney. I said that the Court asked his brother if he desired Counsel. And then he stated about not having food when he was incarcerated there in the jail from the night of the 24th until released, I think, around three or five o'clock on the 25th. And I said I knew nothing of that, the reason why he didn't get food. And I later checked and found out that he was offered food but he did not desire it.

Q. Did you have any discussion with the Petitioner's brother about what procedure he might follow to have the sentence reconsidered?

A. Yes, I told him to go up to the O.M.G. office and see Colonel Morrison and introduce himself and make himself known and tell the Colonel what case he is interested in. And then when the case comes up, why they would know that he is interested in the case. And I also told him to get a lawyer, and he said he had a lawyer in mind, and he had the Attorney General in mind, and he had friends. So I didn't proceed any further as to the possibility of the question of getting Counsel.

(Testimony of Gene A. Trini.)

Mr. Ennis: That's all.

Mr. Anthony: No questions.

(Witness excused.)

Mr. Ennis: I have one more witness on this aspect of the case, your Honor, but he doesn't appear to be here just now, so I will call one witness on another aspect. Captain Wickhem. [561]

J. FRANK WICKHEM,

Captain, U. S. Army, a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Captain Wickhem, will you state your full name and your present occupation?

A. Frank Wickhem. I am a Captain in the Army of the United States.

Q. What is your present position, your present duties?

A. I am assigned to duty with the Office of the Military Governor, and as a part of those duties I have the duties of the Provost Court Commissioner for the Territory of Hawaii.

Q. What did you do before you came into the Army and when did you come in?

A. I came in October 1st, 1942, and I was a practicing lawyer.

Q. Where?

A. At that time in Los Angeles, California.

(Testimony of J. Frank Wickhem.)

Q. How long have you been admitted to the bar?

A. I have been admitted to the bar since 1927.

Q. In California?

A. No, I was first admitted to the bar in the State of Wisconsin, after having graduated from the University of Wisconsin; then in the State of South Dakota, where I practiced until 1939, and then in the State of California.

Q. What duties are assigned to you in connection with your [562] assignment to the Office of the Military Governor?

A. Particularly the duties of the Provost Court Commissioner.

Q. What are those duties?

A. The duties of the Provost Court Commissioner are to coordinate the courts, that is, to see that the various Provost Courts operate under the same policy, to recommend and to help establish policy, to watch questions of jurisdiction, as to whether or not the Provost Courts have jurisdiction of certain offenses or whether they shall go to civilian courts, and to make recommendations and to initiate policies for the operation of the courts.

Q. Will you state very briefly for the Court how the Provost Courts do operate?

Mr. Anthony: I object to that as immaterial, your Honor. I don't see that that has any relevance.

Mr. Ennis: Well, if the Court please, Counsel is attacking the operation of the Provost Courts. It seems to me that it has some pertinence to the dis-

(Testimony of J. Frank Wickhem.)

cussion to know just what its jurisdiction is and how the Court operates. I think the Court will be helped by having some presentation of what the Provost Courts are rather than considering the question of their operations in vacuo without any discussion by the persons who are running them.

Mr. Anthony: Does Counsel intend to review the entire history of the Provost Courts, the number of quarts of blood impounded and bonds and dollars and fines and things of that nature that have been imposed upon the community? I don't know. I'm willing to go into it if the Court feels that there is any relevance [563] in it. I don't see any relevance to it.

Mr. Ennis: I think that the present operation of the Courts, their methods of procedure, should be very briefly described in Court. I don't have in mind the statistics, the summary of all the fines that they imposed.

The Court: Well, it seems to me that the thing more pertinent is, Where did the Provost Courts come from, in what manner and by what authority were they created?—rather than just how they operate at the present time.

Mr. Ennis: I'd be glad to have the witness explain that to the Court.

Q. Would you first explain, Captain Wickhem, upon what authority the Provost Courts operate here?

A. When martial law was declared in the Territory of Hawaii, one of the first general orders

(Testimony of J. Frank Wickhem.)

which was issued—I don't know which one it was, I think it was General Orders No. 2—established Provost Courts and established their jurisdiction, and then named the particular Judges who were to sit as Provost Courts. Now, my understanding as to the authority is the inherent right of an executor or a military commander to establish tribunals to enforce the general orders which are initiated under martial law.

Q. And at present the Provost Courts operate under such general orders? A. That's right.

Q. Will you now state very briefly——

The Court: May I stop you for a minute? Provost Courts are not any regular part of the Army organiaztion, is that so? [564]

The Witness: Yes, they are, Judge. The Courts-Martial Manual, the Manual of Courts-Martial itself, in Article 15 of the Articles of War, recognizes the existence of Military Commissions in Provost Courts.

The Court: And just in those words, that is all?

The Witness: As to jurisdiction.

The Court: Without any definition as to what they are or how they are created, isn't that so?

The Witness: Yes, to my knowledge that is the only reference in the Manual of Courts-Martial.

Mr. Anthony: That's all covered by their own rules, your Honor. It's very clearly covered in the official publications of the U. S. Army, in Field Manual 27-5 and also in The Rules of Winter Warfare.

(Testimony of J. Frank Wickhem.)

The Court: They have been referred to but they haven't been put before the Court.

Mr. Anthony: Well, that is a matter of law, your Honor, which I can argue. I don't think that we need to take our law from the witness on the stand.

The Court: I understand that, but without a background as to what a Provost Court is or intends to be or thinks it is, it is certainly irrelevant just how it operates.

Mr. Ennis: Well, your Honor, as I understand it, the witness has stated under what authority the Provost Courts here in Hawaii, which we are interested in, do operate. Now I think the history [565] of the Provost Courts is probably a matter for legal argument. And I am sure the opposing Counsel will trace the history in his argument. But what I had in mind for Captain Wickhem to tell us is how, in fact, the Provost Courts operate here.

The Court: The objection is overruled, subject to a motion to strike all this testimony.

Q. Will you state now, Captain Wickhem, briefly what procedure is used in the operation of the Provost Courts?

A. Well, the Provost Courts, under the jurisdiction as now set out in General Orders No. 2, have certain specific portions of jurisdiction to operate in; that is, they enforce all of the General Orders. They have jurisdiction of the Armed Forces for traffic violations, either day or night; jurisdiction of all of the civilians only during

(Testimony of J. Frank Wickhem.)

hours of darkness and blackout. The actual operations of the Court, that is, the manner in which a violation is brought to the attention of the Court, is through three enforcing agencies: the Shore Patrol, the Military Police, and the Civil Police. If a violation occurs, a citation is given by one of those agencies to the violator and he is requested then to appear, or summoned to appear at the Police Station within 48 hours for booking.

The Court: What police station?

The Witness: Your Honor, either Honolulu, if the violation occurs in the vicinity of Honolulu, or if it is in the vicinity of Aiea or in the vicinity of Kaneohe Police Station——

The Court: Well, the City and County Police Station, the [566] Civil Police Station?

The Witness: Yes, the Civil Police Station. Upon his appearing and being booked, the charge, the information sheet, is sent over to the Provost Court. That's written up by the Civil Police Officers or by the Military Police or by the Shore Patrol, as the case may be, and then a charge is drawn. That charge is signed by the Prosecutor and its verification taken by an Army Officer, ordinarily the Judge. The defendant is brought into Court; he is arraigned; he is given the right to Counsel; he is informed that he has the right to the issuance of subpoena; he can bring his own witnesses or, if they are not available that he has the process of the Government to bring his wit-

(Testimony of J. Frank Wickhem.)

nesses in for him. Then we proceed to the trial, if the defendant is ready for trial and he acknowledges being ready for trial. The rules of evidence are adhered to in a Provost Court. Incidentally, the men who are sitting as Judges in the Provost Courts at the present time, all of them in civil life were practicing lawyers with the exception of two, your Honor, one on the Island of Lanai and the other is Colonel Dupree, who is a regular Army Officer, but he has had experience in the Legal Department of the Army.

After the case is heard, the Court makes its decision. And after that decision is made then the particular Judge who is hearing the case loses jurisdiction after that particular day. The record is sent to the Office of the Military Governor, where every case is given a review by officers in that department. Applications for clemency, in cases where the defendant feels [567] that the penalty has been excessive, can be addressed to the Military Governor or given consideration or acted upon in that department.

That briefly, Mr. Ennis, is the operation of the Courts.

Q. In connection with the reconsideration, or the review, rather, by the Office of the Military Governor, is it possible to obtain a new trial or is the redetermination made just there?

A. It is possible to obtain a new trial to this extent that it is my understanding that the Office of the Military Governor, in those cases, can cut

(Testimony of J. Frank Wickhem.)

any sentence or can remit any fine; it can do anything it wants to on its own motion, and to my knowledge that action has been taken in many cases.

The Court: And a new trial held?

The Witness: No, I don't recall that a new trial has been granted, but, on the other hand, I don't know of any instance where that has been asked for.

Q. You stated that jurisdiction over civilians on offenses after nightfall—you were referring to traffic offenses?

A. Yes, to traffic offenses. I noticed that omission.

Q. Do the Provost Courts prosecute any civilians on offenses not connected with blackout and similar military security regulations?

A. To my knowledge, all of the General Orders now in effect are essentially security regulations. And a civilian would be prosecuted for a violation.

Mr. Anthony: That is just his conclusion of the law; that is [568] all we are getting from this witness, your Honor.

The Witness: May I proceed?

The Court: Yes.

Mr. Anthony: What his understanding of the orders are I think that I am competent to address the Court on that.

Mr. Ennis: I am asking the witness what the cases actually are that were prosecuted in the Provost Courts.

(Testimony of J. Frank Wickhem.)

The Witness: Any violation of a General Order. And those are General Orders which are sometimes not connected with traffic or blackout.

Q. Have you prepared a summary of the kind of cases that now occur in the Provost Courts and the volume of business?

A. I have, for one month, at your instance, Mr. Ennis.

Q. Have you got that summary with you?

A. I have.

Q. Would you get it, Captain? For what month did you have it prepared?

A. The month of February, 1944.

Q. And what are the statistics of the Provost Courts' activity for that month?

A. This, Mr. Ennis, is the Provost Court at Honolulu, just one Court; in that month there were 1,453 cases that came before the Court. Do you want to know the type of cases? I have them.

Q. Yes, generally.

A. For example, I will read them as they go. They are mostly speeding cases, blackout cases, those which are not speeding [569] are blackout; fraudulent entry into a military area, smoking aboard ship, failure to report military service, parking in a restricted waterfront area, making false statements, absenteeism.

Q. How many convictions?

A. Convictions: 819.

Q. What other categories make up the 1,453?

(Testimony of J. Frank Wickhem.)

A. Of those 1,453 that came before the Court—when I say "came before the Court" that isn't quite a correct statement because of those there were 519 blackout forfeitures. There were 36 traffic forfeitures; 79 cases were dismissed.

Q. Explain what blackout and traffic forfeitures are?

A. Well, it is the policy of the Provost Court that for a first offender who is guilty of being out after curfew, he can put up $5.00 and forfeit it without appearing in Court. If you are riding in a vehicle after curfew, if you put up $10.00 you can forfeit a bail of $10.00.

Q. Was this summary prepared under your direction as the Commissioner of the Provost Court?

A. It was.

Q. And it is an accurate summary and statistical survey of the business for the month of February, 1944?

A. To the best of my knowledge it is.

Mr. Ennis: I offer this in evidence, your Honor, as Government's Exhibit 8, Respondent's Exhibit 8.

The Clerk: Six.

Mr. Ennis: Oh, yes, six. [570]

The Court: That may be received in evidence as Exhibit six. That is what? What do you call it?

The Witness: It is a summary of the business that went through the Provost Court at Honolulu for the month of February, 1944.

(Respondent's Exhibit "No. 6" was received in evidence.)

(Testimony of J. Frank Wickhem.)

RESPONDENT'S EXHIBIT No. 6

SUMMARY OF CASES IN PROVOST COURT FOR THE MONTH OF FEBRUARY 1944

Nature of Cases		Number
GO 8, 2.05	Fraudulent entrance in military area	1
GO 7, 9.01	Smoking aboard ship	2
GO 8, 9.01	Failure to report military service	1
GO 7, 8.05	Parking in res. waterfront area	1
GO 2, 3.03	Contempt of Court	8
GO 9, 13.01	Filing cable w/o approval	1
GO 9, 14.02	Making false statements	1
GO 3, 4.05	Blackout speeding	186
GO 3, 4.06	Blackout parking	276
GO 3, 2.01	Blackout-lights	62
GO 3, 4.02	Blackout—pedestrian	111
GO 3, 4.04	Blackout—vehicle	38
GO 10, 6.02	Absenteeism	51
1258 RO	Speeding	11
6280 RL as am	Heedless & Careless	11
2/234/SL'37 14/234/SL'37	Driving w/o Lic: Not having on person, etc.	12
1313 RO	Unlawful manipulation of levers	1
1214 RO	Going thru red light	5
1240 RO	Following too closely	11
1276 RO	Right of way to ped	1
1239 RO	Driving left of center line	1
1238 RO	Illegal overtaking	2
1325 RO	Failure to make hand signal	1
1544 RO	Disregarding stop sign	1
1213 RO	Failing to obey signal	2
1245 RO	No right of way	5
1261 RO	Drunk Driving	2
1304 RO	Defective brakes	1
1233 RO	Driving on wrong side of road	2
1236 RO	Overtaking another vehicle	1
1250 RO	Unlawful backing	1
1243 RO	Illegal left turn	1
1241 RO	Turning at intersection	1

(Testimony of J. Frank Wickhem.)

Nature of Cases		Number
1246 RO	Failure to yield right of way	5
1284 RO	Failure to remain at scene of accident	2
	Total	819

RECAPITULATION

1.	Convictions	819
2.	Dismissals	79
3.	Blackout Forfeitures	519
4.	Traffic Forfeitures	36
	Total Cases	1453

Additional Information

1.	Suspensions	182
2.	Alien Cases	21
3.	Philippine Nationals	55

[Endorsed]: Filed 4-7-44.

The Court: Is that the only month in which you kept such a record?

The Witness: The only month in which the figures were compiled, your Honor. The records are kept for every month.

The Court: How do these cases of traffic offenses get into that Court, the traffic violations and blackout violations?

The Witness: By citation by the Police Officers, your Honor.

The Court: What do you mean by "Police Officers?" It appears to me that there are two

(Testimony of J. Frank Wickhem.)

classes of police officers. We had a police officer on the stand here awhile ago, this morning, a civil policeman who had something to do with the arrest and presentation of the case before the Provost Court at Pearl City. That police officer apparently didn't belong to the regular Territorial or city and county police.

The Witness: That's true, your Honor. Inside the Pearl Harbor Navy Yard the civil police officers are the enforcing agency with the marines.

The Court: Well, then, you've got a kind of a provost marshal police force, haven't you?

The Witness: Yes, your Honor. [571]

The Court: Well, how many different varieties of police are there?

The Witness: Well, as I said, in the City of Honolulu the enforcing agencies there, your Honor, are the Military Police, the Shore Patrol, and the Civilian Police of the City and County of Honolulu. The Civilian Police referred to in the Duncan case are those who operate, the Civil Service Police who operate only in the Pearl Harbor Navy Yard.

The Court: But the regular City and County Police Officers, when they get a traffic violation at any time, they route the case or someone routes it? Who does that? They do?

The Witness: That's done in the traffic division of the Police Department, Sergeant Camacho.

The Court: By what, by some military order?

(Testimony of J. Frank Wickhem.)

The Witness: By the orders of his superior, the Chief of Police, your Honor.

The Court: The regular civil police officers make arrests for blackout violations?

The Witness: Yes, sir.

The Court: How does that get into the Provost Court?

The Witness: That goes to a different department in the receiving desk at the civil police department, and that in turn routes it to the Provost Court.

The Court: Not all cases, just some go here and some go there?

The Witness: All cases of traffic or blackout, your Honor, during the hours of blackout, go to the Provost Court. [572]

The Court: Haven't some of those gone into the Magistrate Court?

The Witness: Not to my knowledge.

Mr. Ennis: That's all, Captain.

Cross-Examination

By Mr. Anthony:

Q. When did this system begin, this Commissioner of Provost Courts?

A. I don't know, Mr. Anthony, just when that General Order was initiated, but I know that it was in the General Orders at the time they were put out on March 10th.

Q. How long have you held this job of yours?

A. July 18, 1943.

(Testimony of J. Frank Wickhem.)

Q. You said that you had available the statistics for the prior months? A. That's right.

Q. I would like to have your statistics covering the entire period since the initiation of martial law, if you can produce those?

Mr. Ennis: I object to that, your Honor, on the grounds that it is not relevant to the issues here what the Provost Court did since the beginning of martial law, and I don't know whether such statistics are in form to put in. It seems to me it is asking for a great deal of work.

Mr. Anthony: He says they keep regular records. [573]

Mr. Ennis: But they have to be abstracted from the regular records.

The Witness: That's right. I frankly think it can be done but it will entail——

Mr. Anthony: Is it a hard job?

The Witness: It really is, Mr. Anthony.

Mr. Anthony: How about for the year 1943?

The Witness: That could be done.

Mr. Anthony: Fairly simple?

The Witness: That's right.

Mr. Ennis: Have you got those figures presently in any form?

The Witness: We haven't; they will just have to be taken; if you want them divided into cases, they'll have to go through every case and show just what the nature was. Here, if you'll come over here, I'll show you how we did this. (Referring to a list)

(Testimony of J. Frank Wickhem.)

The Court: How did you happen to pick February?

The Witness: Well, your Honor, by reasoning on the thing, that it was the closest to the time of the offense—a complete month which was closest to the time of the offense.

Mr. Anthony: Well, Counsel and I will agree upon what we will ask of you, Captain Wickhem.

Q. Is it a fair statement to say that most of the cases that now come before the Provost Courts involve absenteeism?

A. No, I don't, I won't say that that's true. I think in this particular month there were 51 cases of absenteeism as [574] compared to a total of 1,453.

Q. In the 1,453 you have included all your bail forfeitures, have you not? A. That's right.

Q. Is it a correct statement to say that most of the cases in which persons are imprisoned involve absenteeism?

A. That is a fair statement.

Q. That situation has continued ever since March 10th, is that right? Since March 10th of 1943?

A. I can't state as to that. You mean March 10, 1943, or——

Q. 1943?

A. Well, I think that's a fair statement; you know I wasn't down there prior to July of 1943, but I think that's a fair statement.

Q. Those prosecutions are under what order?

A. General Order 10.

(Testimony of J. Frank Wickhem.)

Q. And by absenteeism you mean what? That word is not mentioned in the General Order, is it?

A. No, that's right. I think the wording of the General Order is "Failure to report to work and work regularly." I don't remember the exact wording but I think that's it in substance.

Q. Well, is it your understanding that anybody can read that General Order and know whether or not he is guilty of an offense?

A. I think so. [575]

Mr. Ennis: I object, your Honor, on the ground that it calls for speculation as to what other people's powers or rationalizations are.

Mr Anthony: There is nothing in that General Order that says anything about absenteeism. I want to know how these defendants know what they are accused of.

The Court: Well, is that General Order before the Court?

Mr. Anthony: Yes.

The Court: Well, is it in a mass of other stuff that points it out?

Mr. Anthony: That's sewed up tight here, your Honor. I'll have to split it.

The Court: You mean that material that came in attached to the return?

Mr. Anthony: Yes, your Honor.

Mr. Ennis: Have you got a copy of it, Captain?

The Witness: Yes, I have.

Mr. Anthony: That's not been offered in evidence but by the traverse we have admitted the

(Testimony of J. Frank Wickhem.)

issuance of all of these General Orders, so in that sense it is before the Court.

Q. You stated, Captain Wickhem, that you made the policy of the Provost Courts?

A. No, I didn't intend to give that impression.

Q. Or you coordinated the policy?

A. That's right, when the policy is established, then I try to see that it is put into effect in each Court. [576]

Q. What is the policy of the Provost Court?

A. Well, in regard to procedure, for example——

Q. Well, what is it?

A. Do you want me to tell you every step? Well, one of the policies of the Provost Court——

Q. What I'm getting at is this, Captain. I won't refer to the policy of the Federal Court or any other Court that I have knowledge of. You have referred to the policy of the Provost Court. Now, I want to know what that policy is.

A. All right. When I used the word, Mr. Anthony, I intended to take in not only procedure but also matters of practice; for example, clemency, things of that kind, clemency, the fact that it is the policy of the Court that anyone who feels that they should do so or feels that they should have some redress, make an application to the Military Governor to obtain that redress.

Q. Where do you find that in any order?

A. That's it; it's the practice; it's not in the General Orders.

(Testimony of J. Frank Wickhem.)

The Court: Well that's after and behind the Courts, some policy behind the Court, is that what you mean, some policy of some authority that is over, larger than the Court, that can, after the Court is through, dispense justice then according to its view?

The Witness: Well, sir, I consider that a part of procedure; that is, the cases are never completed until the Military Governor has reviewed them and has passed upon them and has passed upon [577] any application for clemency.

Q. Who makes this policy?

A. The Military Governor.

Q. You mean the Commanding General of the Hawaiian Department?

A. I think the Commanding General of the Hawaiian Department, to the best of my knowledge, confers with the official, meaning Colonel Morrison, and the policy is arrived at that way.

Q. And General Richardson, so far as your system of Provost Courts is concerned, makes the policy of the Provost Courts?

A. I think General Richardson is familiar with the way the Courts operate, and that he has made any policy and has knowledge of any policy that is in existence now. That is only my own personal opinion.

Q. Well, then, you don't really know where this policy comes from?

A. Except that it comes from the Executive Office of the Military Governor.

(Testimony of J. Frank Wickhem.)

Q. You referred to the Provost Courts having jurisdiction over civilians during blackout.

A. I referred merely to traffic cases.

Q. How about if there is an assault and battery case during blackout, it wouldn't come before your Court? A. That's right, it would not.

Q. Who determines what Court a case will come before?

A. Well, as I explained to Judge Metzger, when the offense comes in it is routed over in the Police Department either to [578] the civilian court or into the Provost Court, and sometimes cases come over there where the facts will show that it was not maybe a blackout offense—it didn't occur during the blackout. Well, that comes to my desk and I send it back.

The Court: Well, that is in Honolulu only?

The Witness: That's right, your Honor. And in the other outlying islands, why the Prosecutor and the Judge are instructed to see that every charge and every factual situation is such that it comes within the jurisdiction of the Court.

The Court: I didn't want to interrupt you.

Mr. Anthony: That's all right, your Honor.

The Court: May I ask, how do you get your convictions into the City and County Jail?

The Witness: Your Honor, if a sentence is pronounced, the Judge signs a commitment just as he did in the present case.

The Court: Well, a commitment in whose name, directed to whom?

(Testimony of J. Frank Wickhem.)

The Witness: Directed to the Oahu Prison or the Warden of the Prison, of the City and County Jail.

The Court: To any prison in the Territory?

The Witness: That's right, your Honor.

The Court: What authority does the custodian or jailer of these jails have to recognize and take into custody such prisoners?

The Witness: That is something that I can't answer, your Honor. I have been informed that there has been an order by one of the Commanding Generals—whether it was General Richardson or [579] probably his predecessor—ordering the various wardens or the jailers to take and keep in custody Provost Court prisoners.

The Court: Do you pay for their keep in the various prisons?

The Witness: To the best of my knowledge, your Honor, that arrangement is taken care of at the time that the amount collected by the Provost Court is turned over to the Territory. The Attorney General probably knows more about that than I.

The Court: The Territory is one thing, in a fiscal way, and the City and County is another. What about your local ones?

The Witness: I don't know about that, your Honor.

The Court: Well, how do you get them out of jail?

(Testimony of J. Frank Wickhem.)

The Witness: At the time that their sentence is served, why they are released.

The Court: And not before?

The Witness: Unless they have been given clemency by the Office of the Military Governor.

The Court: Well, suppose they have been given clemency, how far could that clemency go, all the way to a pardon?

The Witness: It would go all the way to a complete release, your Honor.

The Court: And how is that executed?

The Witness: *And* order is drawn in the Office of the Military Governor and it is taken down to the particular jail or prison where the particular individual is kept.

The Court: Well, these prisoners are sent to the jails by the Provost Court, and are they in a different class than those [580] sent in by the Courts of the Territory, the Magistrate Courts?

The Witness: I can't answer that definitely, your Honor, but it is my impression that they are just in the general run of prisoners in the County Jail.

The Court: This morning the witness for the Petitioner in this case came in here and said he was assigned to hard labor. I don't know whether the charge was really a misdemeanor or a felony charge, but it looked like a misdemeanor with all of the aspects presented here. Do your mittimuses provide for hard labor?

The Witness: It is within the General Order

(Testimony of J. Frank Wickhem.)

to sentence either with or without hard labor, but most of the sentences or the mittimuses do not read that way. I heard that testimony also and I don't know by whose authority he was given hard labor.

The Court: Well, it is designated on the mittimus whether the prisoner is to serve hard labor or not?

The Witness: To the best of my knowledge it is, your Honor.

The Court: Are you familiar with the form of the mittimus?

The Witness: Yes, your Honor.

The Court: I noticed that mittimus running in the name of the Territory. I believe it did, as I looked at it.

Mr. Anthony: Yes, it does.

The Court: Was I right?

Mr. Anthony: Yes, addressed to the high sheriff.

The Court: Well, I think that's all. I just wanted to get some facts.

Mr. Anthony: Is your Honor finished with his examination? [581]

The Court: Yes.

By Mr. Anthony:

Q. Captain Wickham, what law do you enforce in the Provost Court?

A. The orders of the Military Governor.

Q. How about traffic cases?

A. They are made in a particular order. We enforce the Territorial statutes in regard to traffic and also the City and County ordinances.

(Testimony of J. Frank Wickhem.)

Q. Is that in the military orders? A. Yes.

Q. Which one?

A. It is my knowledge that it is in General Order 2, General Order 2, Mr. Anthony.

Q. What paragraph?

A. Paragraph 3.01.

Q. And that says what, that you are authorized to enforce the laws of——

A. The Territory of Hawaii or any ordinance, resolution, by-law or regulation or rule of any city, city and county, or counties, and other municipal or subdivision of the Territory of Hawaii.

Q. That means authorized, the Provost Courts are authorized? A. That's right.

Q. There is nothing obligatory about it, however? A. No, that is true. [582]

Q. In other words, if they want to enforce the laws of the Territory in those Courts, the Judges will do it, and if they didn't want to they won't do it?

A. Well, they try to follow the General Orders.

Q. Well, the General Orders just authorize the Courts to do it? A. That's right.

Q. Presumably the language means what the words say; all that does is give a discretion in that Judge, isn't that a fact?

A. Yes, that's right, that's the way it reads.

Q. Now, you take an Army or Navy officer who is convicted of driving while drunk, either before or after blackout, would the Provost Court take his license away from him? A. Yes, definitely.

(Testimony of J. Frank Wickhem.)

Q. In every case?

A. Yes, we follow the same practice as the Territorial Courts.

Q. Are you sure about that, Captain Wickhem?

A. Mr. Anthony, I'm certain that every Court has been so instructed.

Q. But you are not certain about the fact?

A. I won't say that instances haven't occurred where the license has not been taken away, but if so, it has been by admission or failure of the Judge to follow the policy of the Court. Every case that I have on here, that I have sat on, or that I have witnessed, Mr. Anthony, since I have been here, they have taken the license away. [583]

Q. Are you familiar with Field Manual 27-5?

A. No, I am not.

Q. It has never come to your attention?

A. No, I know of it but I am not familiar with it.

Q. Are you familiar with Field Manual 27-10, containing the rules of land warfare?

A. No, I am not.

Q. These are official documents of the U. S. Army. Just take a glance at them. (Handing witness two books.)

A. Any particular thing you want me to look at?

Q. The Military Government and Provost Courts. You don't purport to operate under either of these documents, do you? A. No.

Mr. Ennis: Objection, your Honor, on the grounds that it is calling for a legal conclusion.

(Testimony of J. Frank Wickhem.)

I think we should argue those matters out as a matter of law.

Mr. Anthony: Well, I just want to make sure that the witness has never even seen them. And he is the Provost Court Commissioner.

Q. You have never examined either one of these publications, that is true? A. That's true.

Q. Do you know whether anybody else in the Office of the Military Governor is familiar with these?

Mr. Ennis: Objection, your Honor.

The Court: Well, that question only goes as to whether he knows or not. [584]

A. I do not know, Mr. Anthony.

Q. Do you know what buildings the Provost Courts occupied in this Territory during the regime of martial law?

A. I know that they were in the City and County Building, the Police Station, the building where the Police Station was located prior to the time when they moved across the way to the present building.

Q. Occupying the Courtroom of the District Magistrate of the City and County of Honolulu?

A. That's right.

Q. When did they move across the street into the Japanese bank?

A. I can't tell you that but I think it was some time in 1942. I can't tell you definitely.

Q. How about over in Hilo, where do they hold court?

(Testimony of J. Frank Wickhem.)

A. They hold court in the District Court in Hilo, the District Courtroom.

Q. That's the District Magistrate's Court for the District of Hawaii? A. That's right.

Q. Used by the Provost Court for the trial of Provost Court prisoners? A. That's right.

Q. Provost Court cases? Most of them turn out to be prisoners, isn't that a fact?

A. No, that isn't true. [585]

Mr. Ennis: I object.

Q. Now, Captain, this review that you have talked about, that's not made public to any member of the public, is it? A. No, it isn't.

Q. You have never seen that published any place that there is such a thing as a review?

A. No, I have never seen it published.

Q. It doesn't appear in any General Orders?

A. No, it does not.

Q. And it is a fair statement to say that whether or not a person can get a review or remission or discharge lies wholly within the discretion of the Office of the Military Governor?

A. That's a fai statement.

Mr. Anthony: That's all.

The Court: Do you mean to say that there is a review made in the absence of any application for a review?

The Witness: That's right, your Honor. Every case gets a review.

The Court: What's the purpose of that?

(Testimony of J. Frank Wickhem.)

The Witness: So as to determine whether or not an injustice has been done in any way, shape or form; if the Court got out of line.

The Court: Who determines that, some superior judicial official that sits behind the Provost Courts?

The Witness: Well, it's reviewed by at least two officers, your Honor, and then it goes to Colonel Morrison. And I don't [586] know this, I don't know whether he takes those matters up with the General or not, but it is my impression that he definitely does.

The Court: All cases or just such a class of cases like absenteeism and labor cases?

The Witness: Every case, your Honor, excepting bail forfeitures, I presume; as a matter of fact, every case that goes up there.

Mr. Anthony: Do you think that the Commanding General reviews these cases?

The Witness: No, I didn't say that. I think that in cases where there is any question about it, or where there is an outstanding situation, I think it is taken up with the Commanding General, but again I say that is my impression entirely. I know it is reviewed by two officers and finally goes to Colonel Morrison.

The Court: Suppose they concluded that too severe a fine has been assessed and collected, is anything done about that?

The Witness: Yes, your Honor, they either remit the fine in whole or in part or take whatever action there is. If it is an incarceration case, they

(Testimony of J. Frank Wickhem.)

take whatever action there is to remit a portion of that.

By Mr. Anthony:

Q. Have any fines ever been paid back?

A. Yes, I know of some down in the Provost Court.

Q. Provost Court?

A. That's right, where we found out the jurisdiction was wrong—fellows have been called in.

[587]

Q. That's what I'm talking about; that's just where you made a mistake? A. That's right.

Q. Where the reviewing authority came to the conclusion that the fine was excessive, has there ever been a fine paid back?

A. If you are differentiating between a fine which has been paid and one which is not——

Q. That's right, after the money gets into the till?

A. I don't know of any. There may have been.

The Court: Well, does every one of these Provost Courts throughout the Territory have an official reporter, a competent reporter?

The Witness: Yes, they do.

The Court: How long has that practice been established?

The Witness: Well, I can vouch for only the time that I have been there, and I visited every Court. I have seen every court in operation with one exception, that is, the Court on the Island of Lanai, and I know that there has been a re-

(Testimony of J. Frank Wickhem.)

porter present in each instance and I know they are so instructed.

The Court: They take all of the proceedings and all the testimony?

The Witness: They don't take all the proceedings and all the testimony, your Honor. They take —if a case is contested, they take a contested case. If a case is a serious case, such as a drunken driving case or something of that nature, they take the testimony and preserve it, even though the plea is guilty. [588]

The Court: Well, if the plea was guilty, there wouldn't be any testimony?

The Witness: Yes, there is, your Honor. In the Provost Court, even though the plea is guilty, the Court is given not only the authorization but the direct order to determine whether or not the facts justify a finding of guilty, because sometimes a man inadvertently enters a plea of guilty when a set of circumstances show in fact he wasn't guilty.

By Mr. Anthony:

Q. Where do you find that in the orders?

A. It is not in the General Orders but it is the practice, it is Courts-Martial practice and it is the practice that's been followed to my knowledge in the Provost Court.

Q. When did the Provost Courts start keeping records?

A. Well, I can't answer that, Mr. Anthony, because as I say——

(Testimony of J. Frank Wiekhem.)

Q. Was it this year?

A. Oh, no, no, no, I can vouch for the fact that ever since I've been there that complete records have been kept and they were complete records when I came down there.

Q. When did you start that?

A. I didn't start it.

Q. When did you start at your job?

A. July 18, 1942-1943.

Q. 1943? A. That's right. [589]

Q. So at least since that time they have kept complete records? A. That's right.

Q. Are they public records?

A. They are certainly available.

Q. Now, don't equivocate, Captain.

Mr. Ennis: I object to that, your Honor. Let him be allowed to ask a question.

The Witness: May I answer?

The Court: Yes.

The Witness: No, they aren't to this extent: If anyone is going to see the records down there, they have to get the permission of the Military Governor.

Mr. Anthony: In other words, members of the public can go down and as a matter of right examine the records of the Provost Court, is that a fact?

The Witness: That's right.

Mr. Ennis: I move that Counsel's remark about the witness equivocating before he started to answer the question be stricken.

(Testimony of J. Frank Wickhem.)

Mr. Anthony: I have no objection to that being stricken.

The Court: Yes, that may be stricken.

Mr. Anthony: That's all.

Redirect Examination

By Mr. Ennis:

Q. Captain, you spoke of the policies adopted in the Provost Court and also of the review of these cases in the Office of the [590] Military Governor. As a result of the review of the cases, do you arrive at a certain coordination of the activity of the Provost Courts? A. That's right.

Q. Do you in that way make uniform their activity and do you reach policies of procedure?

A. That's right.

Q. Do you communicate——

The Court: You are coupling too many questions in one and getting one answer to the whole. I can't tell from the answer just which question he was answering to.

Q. Well, I'll try and break it up, your Honor. Do you, for example, in going over the fines for first offenses in a particular type of case examine the cases to see whether the Courts are more or less uniform in their treatment of that type of case?

A. That is exactly right. We want the Court sitting in Honolulu or the Court sitting in a comparable area some place else to treat the same offense in the same manner.

(Testimony of J. Frank Wickhem.)

Q. Do you then, in the course of that review form a policy in respect of the fine for a first offense for a particular type of case? A. That's right.

Q. Do you communicate that policy to the Courts involved?

A. That is true. I have done it personally.

Q. And is that the kind of thing you mean when you speak of the policy of the Courts? [591]

A. That's it, exactly.

Q. Does the same kind of activity go on in respect to any remissions of fines or any suspensions of convictions?

A. That I can't answer, Mr. Ennis, as I don't take any part in that.

Q. You do not? A. No.

Mr. Ennis: That's all. Thank you.

Recross Examination

By Mr. Anthony:

Q. This review, Captain, how does that work, is it automatic?

A. Every case is reviewed, Mr. Anthony, automatically as soon as it comes up there.

Q. Was Mr. Duncan's case reviewed?

A. Yes.

Q. That was after he filed his Petition?

A. I don't know when it was but I inquired as to whether or not the case has been reviewed and I know it has been.

Q. Was anybody called to present any views on the review other than the military authorities?

(Testimony of J. Frank Wickhem.)

A. I don't know. Again I say I don't take any part in that procedure, so I don't know just what happened.

Q. Well, are the notes transcribed when a case is reviewed?

A. I don't know that. You see, when the Provost Court sends the record up to the Military Governor's Office, then it goes to the office or officers —two of them—for review. But I take no [592] part in that at all.

Q. I know that, Captain, but as the Coordinator of the Provost Courts you know what the Courts do? A. That's right.

Q. Now, do the Courts actually transcribe their cases, their contested cases, and ship a lot of transcripts up for review?

A. No, they do not. For example, all absenteeism cases, those records are kept and they are all requested when there is an application for clemency. But outside of that transcripts are not written up and sent up.

Q. How can a reviewing officer review a case when he doesn't know what was before the Court below?

A. Well, the only thing they can do is to look at the record insofar as the charge is concerned and the sentence.

Q. The pleadings? A. That's right.

Q. Then arrive at a conclusion whether or not justice was done? A. That's right.

Mr. Anthony: That's all.

(Testimony of J. Frank Wickhem.)

The Court: This policy of getting the Provost Courts all on an equalized plane, so as to synchronize them as to punishment for given offenses under similar conditions, that is something you have originated?

The Witness: No, I haven't, Judge Metzger. I think Eddie Silva tried to do the same thing before me. [593]

The Court: That was to correct flagrant earlier abuses, was it?

The Witness: Well, it was to make the Courts operate in such a way so that the sentences meted out would be commensurate with the offenses.

The Court: Do you think you've got that pretty good?

The Witness: We have tried, your Honor.

The Court: All right.

Mr. Ennis: That's all.

(Witness excused.)

ARTHUR L. MUNDO, Lieutenant Commander, U. S. Navy, retired,

a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Will you state your full name and your present title and occupation, please?

A. Arthur L. Mundo, Lieutenant Commander, U. S. Navy, retired.

(Testimony of Arthur L. Mundo.)

Q. How long have you been in the Navy, Judge Mundo?

A. Well, I entered the Navy March 12—no, March 21, 1912.

Q. And how long did you serve in the Navy at that time?

A. I served until I was retired in August of 1920.

Q. What did you do then?

A. I took up the practice of law.

Q. Where were you educated? [594]

A. George Washington University, Washington, D. C.

Q. And of what bar are you a member?

A. I am a member of the bar of the supreme Court of the United States, the bar of the District of Columbia, the state bar of California, and of this bar.

Q. When were you first admitted to the bar?

A. In 1925.

Q. How long did you practice in California?

A. I practiced from 1925 until 1928. Do you want me to continue?

Q. Yes, if you will, Judge.

A. At which time I was appointed by the Board of Supervisors as Township Judge in San Diego Township, which Court later became a municipal Court. On January 5, 1932, I was appointed by the Governor of the State of California as a Judge of the Superior Court of the State of California in and for the County of San Diego.

(Testimony of Arthur L. Mundo.)

Q. How long did you serve in that capacity?

A. I served in that capacity until I was recalled to active duty in the Navy, September 8, 1942.

Q. Ten years?

A. Yes, sir. As a matter of fact, I still have a tenure of office as Judge of the Superior Court.

Q. Will you state very briefly what the jurisdiction of the Superior Court of California is?

A. It is a Court of general jurisdiction. [595]

Q. Civil and criminal?

A. Civil and criminal.

Q. What are your present duties in the Navy, Judge Mundo?

A. I was ordered to return to active duty, for General Court-Martial duty, and I was assigned to the district legal office of the Fourteenth Naval District as an assistant legal officer. My work at that office is upon the General Court-Martial convening in this district, and general legal work.

Q. Are you also assigned as part of your duties to sit as a Judge at the Provost Court in Pearl Harbor?

A. Yes, I was ordered by Admiral Ghormley to sit as Judge of the Provost Court, and by appointment of the Military Governor.

Q. Did you sit as Judge in the case of Lloyd Clifford Duncan, which was tried on March 2, 1944? A. I did.

Q. Do you recall that trial?

A. Yes, sir.

Q. Have you read the transcript of the testi-

(Testimony of Arthur L. Mundo.)

mony which was prepared by the Provost Court reporter at that trial? A. I have.

Q. I show you Respondent's Exhibit 1. (Handing witness a typewritten document.) Can you tell me from the examination of it, Judge, whether it appears to be the original transcript prepared by the reporter?

Mr. Anthony: May I have the same objection to this, your Honor, subject to the motion to strike? [596]

The Court: Yes.

A. That appears to be the original transcript of the testimony taken at that trial.

Q. Is it a complete transcript so far as you recall, Judge, of the testimony that was taken at the trial?

A. As I recall the case, that is the complete transcript.

Q. How long have you been sitting as Provost Court Judge in Pearl Harbor?

A. Since the establishment of the Provost Court at the Navy Yard, in October of last year.

Q. You sit every day?

A. Every day at 8:30 except Sunday.

Q. Do you recall whether there was anything unusual about this particular case?

A. This case was probably a more serious type than we generally have at that Court. Most of the cases are blackout violations and minor traffic offenses. This is the first case of this type that I have had down there.

Q. It was? A. Yes, sir.

(Testimony of Arthur L. Mundo.)

Q. And the sentence that you gave of imprisonment for six months, was that based upon your view of the circumstances of the case?

Mr. Anthony: Just a minute. I object to any comment on the part of the witness as to the fairness or unfairness of his sentence. I don't think that is proper matter of evidence. He [597] gave his best judgment at the time. Why should he come in now and say——

M. Ennis: The Petitioner testified, your Honor, that when he appeared before the Provost Court that it was his impression that the case was decided against him and the proceeding was unfair. Now Counsel brought that out on the Petitioner's own testimony. It has been the cause of going afield in this way.

The Court: The Petitioner testified that he thought the offense he committed, if any, was a trivial one and that he anticipated, by reason of his views of the seriousness of it, that it would be disposed of with a light fine or something of that kind. Now, he was disappointed, that's all.

Mr. Ennis: He stated, your Honor, that the Court proceeding was conducted as if he were already guilty and not merely a question of the offense.

Mr. Anthony: No, he did not. He said that the Judge conducted himself in an entirely impersonal manner.

Mr. Ennis: I agree to that.

Mr. Anthony: There has been no reflection whatsoever on this witness.

(Testimony of Arthur L. Mundo.)

Mr. Ennis: No reflection on the Court but reflection on the conduct of the trial.

Mr. Anthony: He assumed that he would be guilty. Now, that's a fairly reasonable assumption of anybody going into a Provost Court. [598]

Mr. Ennis: I move that that be stricken, your Honor.

The Court: That may be stricken.

Mr. Ennis: Now, as I recall, Petitioner's Counsel has constantly stated that this case, if it were tried in the Civil Court, the sentence would be much less than given in this case.

The Court: Well, that's neither here nor there, whether he stated that. That carries no weight.

Mr. Ennis: Well, let me rephrase the question.

Q. Judge, was the sentence you gave in this case based upon your experience with the cases that come before you in the Provost Court and your general judicial experience?

A. Mr. Ennis——

Mr. Anthony: I object to him commenting on the sentence. I don't see that it has any bearing on this case.

The Court: I don't think so. I would rather not hear that. You did pronounce sentence, and the presumption is that you did it according to your own judgment, and that's the end of that.

Mr. Ennis: Is the objection sustained?

The Court: Yes.

Mr. Ennis: Exception. That's all.

Mr. Anthony: No questions.

(Witness excused.)

Mr. Ennis: Would the Court care to adjourn at this time?

The Court: Yes. We will now adjourn until tomorrow morning. I'll remove the other case from tomorrow's calendar and we will go ahead with this case tomorrow morning. [599]

Mr. Ennis: Well, now, the Court will recall that we stated that we would finish on Tuesday.

The Court: We will jump Monday in this case on account of the arraignments of the indictment cases on Monday. That has already been set. And on account of the number of people involved, and the probable hardship that it might work on a number of them, I don't like to interfere with that. And we had that agreement, as I understood yesterday, that after Saturday we would adjourn until Tuesday morning for this case. That was understood and agreed.

Mr. Ennis: Yes. Well, on the question that we were discussing here, your Honor, whether it will be necessary for us to call witnesses on Tuesday, whether we coudn't finish up Tuesday without a session tomorrow—but if I might have a moment to talk to my associates. I didn't realize we might sit on Saturday.

The Court: Yes.

Mr. Ennis: Well, your Honor, of course we are prepared to go ahead tomorrow, but it wouldn't be a full session as long as those we had in the last few days. And if we might have a short session tomorrow morning, with the understanding that we then finish up Tuesday, that will be all right.

The Court: That's all right. It is entirely agreeable if you can do enough tomorrow and get through with your evidence Tuesday. That will be very good.

Mr. Ennis: Oh, yes.

Mr. Anthony: That is agreeable to me. [600]

The Court: This case is adjourned until tomorrow morning at nine o'clock.

(The hearing adjourned at 12:25 o'clock, p. m.) [601]

Honolulu, T. H.
April 8, 1944
9:06 o'clock, a. m.

(The hearing was continued.)

The Clerk: Habeas Corpus Docket No. 298, in the matter of the application of Lloyd C. Duncan for a writ of Habeas Corpus, case called for further hearing.

Mr. Anthony: Ready, your Honor.

Mr. Ennis: If the Court please, it is the Respondent's purpose this morning to prove the allegations of paragraphs II and XV of the return and answer on pages 18 and 19, in respect to the allegations about the population of the Territory and the part of that population which is of Japanese nationality, and part of the population which has both American and Japanese nationality. I might say at the outset that the Supreme Court of the United States, in Hirabayashi vs. United States,

recites in some detail in the opinion the situation as to dual citizenship of American citizens of Japanese ancestry on the mainland of the United States.

Now, it is the purpose of the Government to rely on judicial notice, as relied on the judicial notice in that case, and to rely upon the authorities cited by the Supreme Court. But in addition to that, to the degree that we are able, we wish to give the Court whatever specific information we can on the subject by way of reference to the population statistics of the Territory, and by reference to the Japansese law in some greater detail than [602] appears in the Supreme Court opinion.

Mr. Anthony: Your honor, the Petitioner's position as to that is that it is entirely irrelevant to any issue in this case. I will make appropriate objection as the evidence is introduced.

Mr. Ennis: I offer in evidence as Respondent's Exhibit 7, six sheets containing population statistics of the Territory, prepared by the Board of Health of the Territory. I believe that opposing Counsel agrees with me as to the accuracy of these figures. Is there objection to them being received in evidence?

Mr. Anthony: No objection to them being received in evidence.

The Court: Received as Exhibit 7.

(Respondent's Exhibit "No. 7" was received in evidence.)

BOARD'S EXHIBIT No. 7

BOARD OF HEALTH
TERRITORY OF HAWAII

POPULATION ESTIMATES AS OF JULY 1, 1943
AND JULY 1, 1944

Area	July 1, 1943	Jan. 1, 1944	July 1, 1944
City of Honolulu	211,847	214,769	217,692
City & County of Honolulu (Exclusive of Honolulu City)	119,724	122,069	124,414
City of Hilo	24,158	24,531	24,904
County of Hawaii (Exclusive of Hilo City)	42,904	42,198	41,491
County of Kalawao	450	447	444
County of Kauai	32,791	32,619	32,448
County of Maui	51,489	51,237	50,986
Territory	483,363	487,870	492,379

Race	July 1, 1943	Jan. 1, 1944	July 1, 1944
Hawaiian	12,617	12,210	11,802
Part Hawaiian	56,932	58,055	59,179
Puerto Rican	8,775	8,854	8,932
Caucasian	155,664	159,172	162,684
Chinese	29,621	29,717	29,813
Japanese	162,690	163,478	164,268
Korean	6,941	6,956	6,970
Filipino	49,261	48,563	47,863
All Others	862	865	868
Territory	483,363	487,870	492,379

Compiled by Bureau of Vital Statistics.
October 28, 1943

[Stamped]: [Illegible]. Mar. 28, 1941.
[In longhand]: [Illegible initials]. 3/31/41.

U. S. DEPARTMENT OF COMMERCE
Bureau of the Census
Washington

March 10, 1941 — Sixteenth Census of the
Hawaii: Population — United States: 1940

RACIAL COMPOSITION OF THE POPULATION OF HAWAII

The Hawaiians, part-Hawaiians, and Caucasians in Hawaii, taken as a single group, increased much more rapidly than the Japanese inhabitants of the Territory during the past decade, and now outnumber the latter element of the population, according to a preliminary report compiled from returns of the Sixteenth Decennial Census, released today by Acting Director Vergil D. Reed of the Bureau of the Census, Department of Commerce.

The Hawaiians and part-Hawaiians increased 26.4 percent, from 50,860 in 1930 to 64,310 in 1940; the Caucasians, 40.8 percent, from 73,702 to 103,791; and the Japanese, 13.1 percent, from 139,631 to 157,905. Thus the Hawaiians and part-Hawaiians increased twice as rapidly, and the Caucasians three times as rapidly, as the Japanese. The Filipino population of Hawaii, which numbered 63,052 in 1930, declined 16.6 percent to 52,569 in 1940.

This report presents comparative figures, for the last three Census years, for the several racial groups which constitute the population of Hawaii. It supplements the report entitled "Summary of Preliminary Population Figures for the Territory of Hawaii: 1940," issued September 3, 1940. All figures in the table below are final.

Board's Exhibit No. 7—(Continued)

POPULATION OF HAWAII, BY RACE: 1940, 1930 AND 1920

Race	1940	1930	1920	Percent of total			Percent of change	
				1940	1930	1920	1930-1940	1920-1930
Total	423,330	368,336	255,912	100.0	100.0	100.0	14.9	43.9
Hawaiian and part-Hawaiian	64,310	50,860	41,750	15.2	13.8	16.3	26.4	21.8
Caucasian	103,791	73,702	49,140	24.5	20.0	19.2	40.8	50.0
Chinese	28,774	27,179	23,507	6.8	7.4	9.2	5.9	15.6
Filipino	52,569	63,052	21,031	12.4	17.1	8.2	-16.6	199.8
Japanese	157,905	139,631	109,274	37.3	37.9	42.7	13.1	27.8
Korean	6,851	6,461	4,950	1.6	1.8	1.9	6.0	30.5
Puerto Rican	8,296	6,671	5,602	2.0	1.8	2.2	24.4	19.1
Other	834	780	658	.2	.2	.3	6.9	18.5

[In pencil]: 11037

Board's Exhibit No. 7—(Continued)

POPULATION, BY AGE, FOR THE TERRITORY OF HAWAII: CENSUS, 1940

Age	Territory of Hawaii Total	%	Oahu Total	%	Hawaii Total	%	Kauai Total	%	Niihau Total	%	Maui Total	%
All Ages	423,330	100.00	257,664	100.00	73,276	100.00	35,636	100.00	182	100.00	46,919	100.00
Under 5 Years	40,085	9.47	22,937	8.90	7,418	10.12	3,414	9.58	42	23.08	2,255	11.20
5 - 9 Years	43,431	10.26	24,571	9.54	8,343	11.39	3,806	10.68	34	18.68	5,721	12.19
10 - 13 Years	38,132	9.01	21,596	8.38	7,404	10.11	3,325	9.33	14	7.69	5,038	10.74
14 Years	9,363	2.21	5,199	2.02	1,870	2.55	837	2.35	4	2.20	1,244	2.65
15 - 19 Years	48,336	11.42	29,738	11.54	8,323	11.36	3,893	10.92	19	10.44	5,554	11.84
20 - 24 Years	51,075	12.06	36,837	14.30	6,128	8.36	2,949	8.28	11	6.04	4,252	9.06
25 - 29 Years	42,332	10.00	27,236	10.57	6,410	8.75	3,667	10.29	11	6.04	3,861	8.23
30 - 34 Years	33,388	7.89	20,163	7.83	5,664	7.73	3,253	9.13	15	8.24	3,322	7.08
35 - 44 Years	51,000	12.04	30,752	11.93	8,639	11.79	4,734	13.28	17	9.34	5,345	11.39
45 - 54 Years	32,603	7.70	19,463	7.55	5,973	8.15	2,783	7.81	6	3.30	3,603	7.68
55 - 64 Years	20,517	4.85	11,952	4.64	4,139	5.65	1,735	4.84	4	2.20	2,270	4.84
65 - 74 Years	10,107	2.39	5,553	2.15	2,348	3.20	954	2.68	3	1.65	1,107	2.36
75 Years & Over	2,961	0.70	1,667	0.65	617	0.84	286	0.80	2	1.10	347	0.74

Age	Lanai Total	%	Kahoolawe Total	%	Molokai Total	%	Honolulu City* Total	%	Rural Oahu Total	%	Outlying Islands*1 Total	%	Palmyra Total	%
All Ages	3,720	100.00	1	100.00	5,340	100.00	179,326	100.00	78,338	100.00	560	100.00	32	100.00
Under 5 Years	379	10.19	—	—	639	11.97	16,947	9.45	5,990	7.65	1	0.18	—	—
5 - 9 Years	360	9.68	—	—	596	11.16	17,919	9.99	6,652	8.49	—	—	—	—
10 - 13 Years	266	7.15	—	—	489	9.16	15,808	8.82	5,788	7.39	—	—	—	—
14 Years	72	1.94	—	—	137	2.57	3,828	2.13	1,371	1.75	—	—	—	—
15 - 19 Years	333	8.95	—	—	463	8.67	20,293	11.32	9,445	12.06	13	2.32	—	—
20 - 24 Years	335	9.00	—	—	406	7.60	21,342	11.90	15,495	19.78	150	26.79	7	21.87
25 - 29 Years	485	13.04	—	—	525	9.83	18,165	10.13	9,071	11.58	127	22.68	10	31.25
30 - 34 Years	435	11.69	—	—	441	8.26	14,069	7.85	6,094	7.78	90	16.07	5	15.63
35 - 44 Years	605	16.26	—	—	786	14.72	21,951	12.24	8,801	11.23	115	20.54	7	21.87
45 - 54 Years	226	6.08	—	—	493	9.23	14,210	7.92	5,253	6.70	53	9.46	3	9.38
55 - 64 Years	181	4.87	1	100.00	224	4.19	9,077	5.06	2,875	3.67	11	1.96	—	—
65 - 74 Years	37	0.99	—	—	105	1.97	4,353	2.43	1,200	1.53	—	—	—	—
75 Years & Over	6	0.16	—	—	36	0.67	1,364	0.76	303	0.39	—	—	—	—

* Palmyra Island not included in Honolulu City population figures.

*1 The outlying islands (Baker, Canton, Enderbury, Howland, Jarvis, Johnston, and Midway), although not under the jurisdiction of the Territory of Hawaii, are for census purposes included in the totals for the Territory and for Honolulu County.

Board's Exhibit No. 7—(Continued)

POPULATION, BY RACE, FOR THE TERRITORY OF HAWAII: CENSUS, 1940

Race	Territory of Hawaii Total	%	Oahu Total	%	Hawaii Total	%	Kauai Total	%	Niihau Total	%	Maui Total	%
All Races	423,330	100.00	257,664	100.00	73,276	100.00	35,636	100.00	182	100.00	46,919	100.00
Hawaiian	14,375	3.40	7,064	2.74	3,451	4.71	732	2.05	156	85.71	2,102	4.48
Part Hawaiian	49,935	11.80	31,367	12.17	7,901	10.78	2,647	7.43	19	10.44	6,007	12.80
Caucasian	103,788	24.52	82,086	31.86	9,821	13.38	4,464	12.53	1	0.55	6,588	14.04
Chinese	28,774	6.80	24,554	9.53	1,832	2.50	862	2.42	—	—	1,304	2.78
Filipino	52,570	12.41	19,067	7.40	12,845	17.53	10,149	28.48	—	—	7,659	16.32
Japanese	157,904	37.30	83,385	32.36	34,865	47.58	15,464	43.39	6	3.30	21,656	46.16
Other Races	15,984	3.77	10,141	3.94	2,561	3.50	1,318	3.70	—	—	1,603	3.42

	Lanai Total	%	Kahoolawe Total	%	Molokai Total	%	Outlying Islands*1 Total	%	Palmyra Total	%	Honolulu City* Total	%	Rural Oahu Total	%
All Races	3,720	100.00	1	100.00	5,340	100.00	560	100.00	32	100.00	179,326	100.00	78,338	100.00
Hawaiian	115	3.09	—	—	729	13.65	21	3.75	5	15.63	5,457	3.04	1,607	2.05
Part Hawaiian	263	7.07	—	—	1,645	30.81	73	13.04	13	40.62	25,583	14.27	5,784	7.38
Caucasian	138	3.71	1	100.00	262	4.91	414	73.93	13	40.62	50,892	28.38	31,194	39.82
Chinese	71	1.91	—	—	138	2.58	12	2.14	1	3.13	22,445	12.52	2,109	2.69
Filipino	1,567	42.12	—	—	1,283	24.03	—	—	—	—	6,887	3.84	12,180	15.55
Japanese	1,310	35.22	—	—	1,217	22.79	1	0.18	—	—	60,593	33.79	22,792	29.10
Other Races	256	6.88	—	—	66	1.23	39	6.96	—	—	7,469	4.16	2,672	3.41

* Palmyra Island not included in Honolulu City population figures.

*1 The outlying islands (Baker, Canton, Enderbury, Howlitt, Jarvis, Johnston, and Midway), although not under the jurisdiction of the Territory of Hawaii, are for census purposes included in the totals for the Territory and for Honolulu County.

Board's Exhibit No. 7—(Continued)

JAPANESE POPULATION BY AREA AND BY BROAD AGE GROUPS FOR MALES FOR THE TERRITORY OF HAWAII, 1940 and 1930, AND BY COUNTIES AND PRINCIPAL CITIES, 1940.—(All 1940 figures in this table are preliminary and subject to revision)

County or city		Total	Male	Female	Males by broad age groups		
					Under 18	18 to 44	45 and older
Territory of Hawaii, total	1940	157,849	82,784	75,065	34,795	31,348	16,641
	1930	139,631	75,008	64,623	36,774	21,849	16,385
Percent of increase		*13.0	10.4	16.2	—5.4	43.5	1.6
	1940						
Honolulu County		83,383	43,475	39,908	17,656	17,771	8,048
Honolulu city		60,591	31,221	29,370	12,199	13,476	5,546
Remainder of county		22,792	12,254	10,538	5,457	4,295	2,502
Hawaii County		34,864	18,271	16,593	7,955	6,057	4,259
Greater Hilo city		11,207	5,659	5,548	2,339	2,185	1,135
Remainder of county		23,657	12,612	11,045	5,616	3,872	3,124
Maui County		24,084	12,877	11,207	5,799	4,495	2,583
Wailuku city		3,591	1,864	1,727	825	711	328
Remainder of county		20,493	11,013	9,480	4,974	3,784	2,255
Kauai county		15,469	8,131	7,338	3,384	3,001	1,746
Kalawao County		49	30	19	1	24	5

* The corresponding percent of increase in the total population (all races) of the Territory of Hawaii was 14.9.

vs. Lloyd C. Duncan

Board's Exhibit No. 7—(Continued)

BOARD OF HEALTH

TERRITORY OF HAWAII

POPULATION ESTIMATES AS OF JULY 1, 1940 AND JULY 1, 1941

Area	July 1, 1940	Jan. 1, 1941	July 1, 1941
City of Honolulu	180986	190573	200158
City & County of Honolulu (Exclusive of Honolulu City)	79899	95121	110345
City of Hilo[1]	24341	23504	22667
County of Hawaii: (Exclusive of Hilo City)	49222	47475	45731
County of Kalawao	465	465	464
County of Kauai	35956	34718	33479
County of Maui	55785	54140	52495
Territory	426654	445996	465339

Race	July 1, 1940[2] Total	July 1, 1940[2] Citizens	July 1, 1940[2] Non-Citizens	Jan. 1, 1941 Total	July 1, 1941 Total	July 1, 1941 Citizens	July 1, 1941 Non-Citizens
Hawaiian	14359	14359	—	14303	14246	14246	—
Part-Hawaiian	50470	50470	—	51457	52445	52445	—
Puerto Rican	8322	8322	—	8391	8460	8460	—
Caucasian	106381	103700	2681	124004	141627	139299	2328
Chinese	28834	24245	4589	29035	29237	24886	4351
Japanese	157990	121312	36678	158762	159534	124351	35183
Korean	6854	4517	2337	6867	6881	4628	2253
Filipino	52607	17109	35498	52334	52060	18050	34010
All Others	837	807	30	843	849	832	17
Territory	426654	344841	81813	445996	465339	387197	78142

[1] Sec. 2801 R. L. 1935 as amended by Act 103 S. L. 1941

[2] Revised estimates.

Compiled by Bureau of Vital Statistics.

H. F. HARALSON, M. D.
H. F. Haralson
Territorial Commissioner of Public Health

[Endorsed]: Filed 4-8-44.

The Court: In a summarizing way, what does your Exhibit 7 show?

Mr. Ennis: Exhibit 7, your Honor, gives the population estimates of the Territory as of July 1, 1944 and 1943.

The Court: Not July 1, 1944, is it?

Mr. Ennis: Your Honor, these are estimates of population based upon——

The Court: What the population will be of that date?

Mr. Ennis: Yes, that's right, your Honor.

The Court: That estimate was made by someone in the Board of Health of the Territory?

Mr. Ennis: Yes, it was submitted to Counsel by Dr. Lee, the Director of the Board of Health, made in his office; and the estimates are based upon the last official Federal Census of 1940 [603] and their projection of the Federal Census.

The Court: Do they take the progression and increase up to a certain time and just continue right through and arrive at that figure?

Mr. Ennis: Yes, and they also take into consideration the death rates and deductions of that character, your Honor.

The Court: Well, what is your figure?

Mr. Ennis: Well, the total figure for July 1, 1943, is 483,363; and for January 1, 1944, it is 487,870; and for July, 1944, the estimated figure——

The Court: 483——

Mr. Ennis: 487,870; and for July, 1944, 492,379. Now, the exhibit breaks those total figures down

according to counties in the Territory and also according to races. The second sheet of the exhibit——

The Courtff Well, what is it you want to call the Court's attention to there, is it a matter of races or otherwise?

Mr. Ennis: The exhibit is offered, your Honor, to support the allegation of the return, which we wish to bring to the Court's attention, and to prove as a basis for some of the testimony on Tuesday that the appraisals of the military situation in the Territory, which is the basis for the contention of the need of the continuation of martial rule in the respect that it still exists here, is based in part upon the nature of the population, and in part upon the relationship of part of the population to [604] the enemy which is being fought in this area of the war.

The Court: What is the nature of this population?

Mr. Ennis: Well, your Honor, the exhibit will show that the population in large part is of Japanese ancestry, a factor which the Supreme Court of the United States in the Hirabayashi case said was a military consideration which the Military Commanders could take into account in formulating the curfew law which was placed in effect on the West Coast at the beginning of the war.

The Court: Well, what is that proportion?

Mr. Ennis: Well, the proportion roughly, your Honor, is about a third of the total population.

I'll be glad to give you the figures from the exhibit, if you'd like to have them.

The Court: Yes, I want to get at the meat of your exhibit. I'm unalterably opposed to just massing exhibits into the record and saying, well, it's before the Court. I want you to present it to the bench.

Mr. Ennis: Well, that portion of the population which is of the Japanese race is—giving you the figures relative to the last three figures that I gave you for the same dates—162,690, 163,478, and 164,268.

The Court: That's Japanese, racially Japanese?

Mr. Ennis: That's right, your Honor, yes.

The Court: It doesn't show how many of them are aliens, or does it; and how many are native born?

Mr. Ennis: This particular exhibit and this part of the [605] evidence does not show, your Honor, the part that are alien and native born, but the testimony will do that, which I am about to produce. I think that's all that's necessary to say about the exhibit, your Honor, and I will produce the witness.

The Court: All right.

ANDREW S. WONG, Lieutenant, U. S. Army, a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Will you state your full name and your present occupation, please?

A. Andrew S. Wong, Officer, U. S. Army.

Q. When did you go on active duty in the U. S. Army? A. February 20, 1942.

Q. What was your occupation before that?

A. I was Director of the Bureau of Vital Statistics.

Q. Here in the Territory? A. Yes.

Q. How long did you occupy that position?

A. I was appointed to that position in September, 1941, and occupied it up to February 20th.

Q. And you, of course, are familiar with the way the records of the Bureau were kept during your occupancy of that office? A. I am. [606]

Q. Have you prepared from the records and do you have with you a statistical survey of the population figures for the years 1924 until the present time, to 1941? A. Yes, I have.

Q. Will you state to the Court what the records of the Bureau show as to the births, the registration of births of American citizens of Japanese ancestry for those years, registered with both the Board of Health and also as reported by the Japanese Consulate as registered with the Consulate?

(Testimony of Andrew S. Wong.)

A. The records of the Bureau show, reports either in the official documents or publications, the number of births of Japanese ancestry reported with the Japanese Consulate. These figures are available annually. The records also show a breakdown by racial groups of the births registered at the Board of Health in the Territory. The records I have here give a summary of the births reported from 1915 to 1941, inclusive, to both agencies.

Q. Will you explain how the Board of Health obtained these figures from the Japanese Consulate and what was the purpose of it?

A. The Board of Health has always endeavored to make its birth registrations as complete as possible. This effort is in accordance with the policy of the Bureau of the Census to increase the completeness of registration to the extent whereby all states and territories would be eligible to enter the birth registration area. We realize that there were a considerable [607] number of births prior to 1921 which were registered at the Japanese Consulate and were not registered at the Territory. Therefore, in an effort to get as many births as possible into the Territorial records, a request was made to the Japanese Consulate to have them encourage the reporting of births to the Board of Health.

The second reason was for use of these figures in the calculation of the population estimates every year. And it was necessary to secure data pertaining to the population from all agencies concerned. And when all this data was obtained and

(Testimony of Andrew S. Wong.)

assembled locally, the population estimates were then made.

Q. Did the Japanese Consulate report the births every year?

A. We have records for each year.

Q. From the Board of Health?

A. From the Board of Health.

Q. From the report that the Japanese Consulate gave you? A. Yes.

Mr. Ennis: We'll mark this paper, entitled "Births of Japanese in the Territory of Hawaii," as Respondent's Exhibit for identification.

The Clerk: Exhibit No. 8 for identification.

(Received and marked "Respondent's Exhibit No. 8 for identification.")

Q. Lieutenant, I show you Respondent's Exhibit No. 8 for identification. (Showing witness a typewritten piece of paper.) Is that a summary from the records of the Board of Health of the [608] births reported both to the Territory and by the Japanese Consulate to the Territory?

A. Yes, sir, it is.

Q. That is an accurate summary from the records? A. Yes.

Mr. Ennis: I offer Respondent's Exhibit 8 for identification in evidence.

Mr. Anthony: I have no objection, your Honor.

The Court: Received in evidence Exhibit 8. Tell me what it is.

Mr. Ennis: If the Court please, this exhibit by

(Testimony of Andrew S. Wong.)

years, from 1925 on, shows the number of births reported to the Japanese Consulate and also the number of births of persons of Japanese ancestry reported to the Territory.

The Court: Would there be a duplication there or how is it that the same births are not reported?

Mr. Ennis: Yes, your Honor, the same person might report both to the Territory and to the Japanese Consulate. There is also shown on this exhibit the difference between the total report of the Japanese Consulate and the larger number reported to the Territory. And as a basis for showing that, only those persons who reported to the Japanese Consulate are treated for purposes of our calculations as being possibly dual citizens.

The Court: All right.

(Respondent's Exhibit "No. 8" was received in evidence.) [609]

RESPONDENT'S EXHIBIT No. 8

BIRTHS OF JAPANESE IN THE TERRITORY OF HAWAII
and
NUMBER REPORTED TO THE JAPANESE CONSULATE
for the
FISCAL YEAR 1915-1941

Fiscal Year	Births reported to Japanese Consulate			Total births in Terr. of Hawaii		
	Total	Males	Females	Total	Males	Females
1915	4,606	•	•	3,377	1,821	1,556
1916	4,639	•	•	3,662	1,974	1,688
1917	4,918	•	•	4,260	2,321	1,939
1918	5,086	•	•	4,579	2,365	2,214
1919	4,807	•	•	4,391	2,356	2,035

(Testimony of Andrew S. Wong.)

Fiscal Year	Births reported to Japanese Consulate Total		Males	Females		Total births in Terr. of Hawaii Total	Males	Females
1920	5,286		*	*	/	4,963	2,636	2,327
1921	5,001		*	*	/	4,910	2,624	2,286
1922	4,682		*	*	/	5,590	2,994	2,596
1923	4,629		*	*	/	5,689	2,954	2,735
1924	4,493		*	*	/	5,820	2,961	2,859
1925	4,335	(1,851)	*	*	/	6,186	2,233	2,953
1926	5,251	(343)	*	*	/	5,594	2,921	2,673
1927	2,756	(2,995)	*	*	/	5,751	2,878	2,873
1928	1,935	(3,213)	*	*	/	5,148	2,649	2,499
1929	1,724	(3,460)	889	835	/	5,184	2,667	2,517
1930	1,325	(3,330)	681	644	/	4,655	2,416	2,239
1931	1,186	(3,386)	611	575	/	4,572	2,353	2,219
1932	982	(3,416)	490	492	/	4,398	2,258	2,140
1933	825	(3,097)	449	403	/	3,922	2,024	1,898
1934	778	(2,915)	407	371	/	3,693	1,863	1,830
1935	731	(2,834)	390	341	/	3,565	1,803	1,762
1936	681	(2,570)	860	321	/	3,251	1,631	1,620
1937	660	(2,458)	353	307	/	3,118	1,593	1,525
1938	636	(2,527)	326	310	/	3,163	1,636	1,527
1939	691	(2,439)	368	323	/	3,130	1,615	1,515
1940	765	(2,572)	401	364	/	3,337	1,721	1,616
1941	860	(2,388)	466	394	/	3,248	1,625	1,623
		45,794						

* Not available.

Compiled by Bureau of Vital Statistics.

[Endorsed]: Filed 4-8-44.

By Mr. Ennis:

Q. Lieutenant Wong, from the statistics of the Board of Health, what is the official estimate of American born Japanese in the Territory as of July 1, 1941? A. 124,351.

Q. And taking into account the births reported to the Japanese Consulate, and the births reported

(Testimony of Andrew S. Wong.)

to the Bureau of Vital Statistics, have you calculated the number of persons of Japanese ancestry whose births were not registered with the Japanese Consulate? A. Yes, I have.

Q. What is that number?

A. The number of Japanese births——

Mr. Anthony: Just a minute. I object to that question, if your Honor please. The Lieutenant hasn't said that these were recorded with the Japanese Consulate. He has said that this is what the Consulate reported to him. There is no evidence that anybody was recorded with the Japanese Consulate.

Mr. Ennis: Well, I'll reframe the question accordingly.

Q. Lieutenant, have you made a calculation based upon the number of births reported to the Board of Health by the Japanese Consulate as having been recorded with the Japanese Consulate, and the number of births reported directly to the Board of Health?

A. Yes. The Japanese births which were reported by the Consulate to the Bureau of Vital Statistics and reported to the Japanese Consulate, the number is approximately 45,794. [610]

Q. And for what years is that total?

A. From 1925 to 1941, inclusive.

Q. Have you also calculated the number of applications by persons of Japanese ancestry during that period, applications for expatriation?

(Testimony of Andrew S. Wong.)

A. It was not a calculation. It is information from confidential sources.

Q. Well, now, just a minute, Lieutenant. You have figures based on information from confidential sources as to the number of applications for expatriation? A. That's right.

Q. Will you state that number?

Mr. Anthony: I object to that, if the Court please. There is no basis laid for any such testimony by this witness. He is testifying from public records, and now he comes into Court and says he has some confidential testimony he'd like to give testimony about.

Mr. Ennis: Well, I'd like to explain that. If Counsel doesn't wish the information—the purpose of this figure is to provide a deduction from the number of dual citizens claimed by the Respondent. It is information obtained from a source that we cannot reveal, but the use of the figure results in a lesser number of dual citizens by calculating the expatriates than we will otherwise reach. And if Counsel has objection to the figure, why we won't put it in.

Mr. Anthony: I haven't heard any evidence yet about any [611] dual citizens, your Honor. I'd like to know what one is.

Mr. Ennis: It is our purpose, your Honor, to produce evidence on the Japanese law on Japanese citizenship, and it is our desire to lay a factual basis as to what persons were reported as registered with them, because that is an important fac-

(Testimony of Andrew S. Wong.)

tor under Japanese laws, which we will undertake to prove. Now, as I say, the only purpose of this figure is to concede that a substantial number of persons of Japanese ancestry in the Territory applied for expatriation, and we are willing to concede for the purposes of calculation that every applicant was expatriated. Probably a number of applications were not acted upon.

Now, the only difficulty with the testimony, as I see it, is that we are not prepared to give the source of the information.

The Court: The objection must be sustained, however.

Mr. Ennis: Well, now, to make the record clear, Lieutenant Wong, will you state in a general way what your present duties are?

A. I am an assistant to the officer in charge for Military Intelligence on matters pertaining to internal security.

Q. Have you, in the course of your duties, obtained this figure of the number of applications by persons of Japanese ancestry in this Territory for expatriation from Japanese citizenship?

A. Yes.

Mr. Ennis: For the record, your Honor, I will again ask the witness to state that number.

Mr. Anthony: Well, my present objection, your Honor, is [612] that it is entirely out of order. We don't even know that there is such a thing as a dual citizen. Now, I don't see why we don't find out what he is talking about first. What is a

(Testimony of Andrew S. Wong.)

dual citizen? I have examined this subject with some degree of care and I am not prepared and I wouldn't be prepared to testify as to what a dual citizen is.

The Court: Well, expatriation would be a definite thing. If he knows and can tell how he knows what the number of applications were for expatriation before the Japanese Consulate, that is, persons of Japanese ancestry born here in the Territory of Hawaii, that would be competent evidence, at least as to the matter contended for by the Respondent.

Mr. Ennis: Well, I don't want to quarrel about offers of proof, your Honor. Of course, we could put in our evidence of the Japanese law first, which we contend relates to how many persons registered with the Japanese Consulate. I think it is entirely logical to put in the factual information first.

Mr. Anthony: If the Court please, I will withdraw my objection. I will address myself later to the relevancy of the entire line; it is getting pretty far afield.

By Mr. Ennis:

Q. Will you state that figure, Lieutenant?

A. 15,537.

The Court: During what period of time?

The Witness: From 1915 up to the year 1941, inclusive.

Q. Have you calculated an adjustment of those last two [613] figures, namely, persons not registered with the Japanese Consulate and applicants

(Testimony of Andrew S. Wong.)

for expatriation, to take care of deaths, migrations and incomplete birth registrations?

A.—Yes, I have calculated an adjustment of individuals who were reported to the Japanese Consulate and not reported to the Board of Health, as well as considered the factors of migration and deaths which might be applied to a population group concerned.

Q. That is a general calculation? A. Yes.

Q. What is that figure? A. 1,125.

Q. From these calculations what is the total of non-dual citizens that you have calculated?

A. 60,206.

Q. And you have calculated an estimated number of dual citizens by subtracting that figure, from the total Japanese population of the Territory?

A. Yes, I have.

Q. And that figure is? A. 64,145.

Q. Have you also obtained from the records of the Board of Health the number of alien Japanese in the Territory? A. Yes, I have.

Q. And what is that figure? A. 35,183.

Q. And the total of the calculated number of dual citizens [614] and aliens is? A. 99,328.

Mr. Ennis: I request that this memorandum, dated April 7, 1944, be marked as Respondent's Exhibit 9 for identification.

(Received and marked "Respondent's Exhibit 9 for identification.")

The Court: What is that last figure you gave, Lieutenant?

(Testimony of Andrew S. Wong.)

The Witness: 99,328.

Q. I show you Respondent's Exhibit 9 for identification. Is that a memorandum containing the figures which you have calculated? (Showing a typewritten sheet of paper to the witness.)

A. Yes, I have.

Q. Did you prepare this memorandum?

A. Yes, I did.

Mr. Ennis: I offer it in evidence. (Showing a typewritten sheet of paper to Mr. Anthony.)

Mr. Anthony: All right.

The Court: Exhibit 9.

(Respondent's Exhibit "No. 9" was received in evidence.)

RESPONDENT'S EXHIBIT No. 9

Memorandum: 7 April 1944

Estimate of Dual Citizens of Japanese Ancestry in Territory of Hawaii as of 1 July 1941

1.	Official estimate American-born Japanese (Bureau of Vital Statistics)		124,351
2.	Japanese Births reported to Bureau of Vital Statistics and not reported to Japanese Consulate	45,794	
3.	Applications for expatriation	15,537	
		61,331	
4.	Adjustment including deaths, migration and incomplete birth registration	1,125	
5.	Non dual citizens		60,206
6.	Estimated No. of dual citizens		64,145

Aliens	35,183
Dual citizens	64,145
Total	99,328

[Endorsed]: Filed 4-8-44.

(Testimony of Andrew S. Wong.)

Mr. Ennis: That's all, Lieutenant.

Cross Examination

By Mr. Anthony:

Q. The Board of Health does not purport to keep, by virtue of the statutes and regulations, any information relating to dual citizens, is that not correct? [615]

A. Yes. And there was no such intention at the time data relative to Japanese births were gathered.

Q. You didn't intend to obtain information relative to dual citizens, that wasn't part of the program, was it? A. No.

Q. You were just tapping all sources to find the total births in the Territory? A. Yes.

Q. These figures that you have submitted, do they include the Japanese that are now fighting over in Italy? A. Yes.

Q. Do they include Japanese that have been migrated, detainees or evacuees from this area?

A. Any movements following 1941 are, of course, not included. These figures are up to July 1, 1941.

Q. As a matter of fact, there may be a large number of Americans of Japanese ancestry who are presently serving in the Armed Forces that are squarely within this figure of 64,145?

A. That is possible.

Q. Lieutenant, at any time did the Armed Forces make any inquiry as to whether a person was a dual citizen before he was accepted for military service? Remember when the "Victory Volun-

(Testimony of Andrew S. Wong.)

teers" were presenting themselves for service in this Territory? You recall that, don't you?

A. Yes.

Q. Roughly 10,000 of them? [616]

A. Yes.

Q. It is a fact, is it not, that there was no inquiry made as to whether they were dual citizens at that time by the Army?

A. I am not at liberty to discuss that information.

Q. Is that a military secret?

A. Under the circumstances, I can't answer.

Q. I don't see how that could affect the security of this Territory.

The Court: I can't follow that.

Mr. Ennis: Perhaps the Lieutenant doesn't understand. Would it be fair to say that your question was a matter of public knowledge, where the applicants were asked publicly whether or not they were dual citizens?

Mr. Anthony: No, I'm asking him whether the applicants were asked.

Q. Will you state to the Court how this "Victory Volunteer" program was handled by the Army, briefly?

A. That recruiting program came in a section different from the activity performed by the section of the office with which I am concerned.

Q. I understand that, but how was the program operated?

(Testimony of Andrew S. Wong.)

A. You mean as far as the activity of our own office was concerned with respect to the selection of these individuals who volunteered, or just on the procedure by which they volunteered?

Q. Well, what did they do first? [617] Did they fill in blanks?

A. Yes, they filled in blanks.

Q. Is there any place on any of those blanks the question, "Are you a dual citizen"—or anything like that?

A. There was information pertaining to the race.

Q. What race you were?

A. The racial background, the pertinent personal history information concerning the parents of the individuals and a complete summary of activity.

Q. I can understand that, but was there any inquiry in those blanks directed to the eliciting of the answer to the question, Are you a dual citizen. A. That I don't know.

Q. Can you ascertain that for us?

A. I would be able to take a look at the form that they filled out and determine just whether it included that provision or not.

Mr. Ennis: If Counsel is interested in that particular item, I will ascertain what the fact is.

By Mr. Anthony:

Q. At the time the AJA's were organized, do you recall that incident?

A. Yes, I do.

(Testimony of Andrew S. Wong.)

Q. That body of men consisted of what, Americans of Japanese ancestry?

A. That's right. [618]

Q. Did they ask those boys before they enlisted in the Armed Forces whether or not they were dual citizens?

A. That information was all obtained.

Q. I'm asking you whether or not that was asked of these boys?

A. I don't know.

Q. You said that information was all obtained. What do you mean by that?

A. I should say that information was available.

Q. What information?

A. Concerning their birth place and data concerning the birth places of their parents.

Q. You don't mean to intimate to the Court that you ascertained whether or not these boys were dual citizens before permitting them to join the AJA? A. No, I don't.

Q. Is it fair to say, then, Lieutenant, that at the time these boys were inducted int the Armed Forces, including this group that is now fighting in Italy, there was no question raised in the selectivity of that group as to whether or not they were dual citizens?

A. I intimated at the beginning I don't know exactly whether they inquired as to that specific information.

(Testimony of Andrew S. Wong.)

Mr. Anthony: Mr. Reporter, will you read his answer?

(The Reporter read the last answer.)

Q. How about your office? [619]

A. As I stated previously, complete background information was available, and therefore whether they asked it or not of the applicant, I don't know.

Q. You still haven't answered my question. What did your office do?

A. I don't know.

Q. You are assistant to whom?

A. I said I am one of the assistant officers to the officer in charge.

Q. Of internal security?

A. Pertaining to matters relating to internal security.

Q. Lieutenant, you are familiar with the change of heart in regard to the induction of Japanese into the Armed Forces, are you not, that has recently taken place? A. Yes.

Q. And they are now being inducted just like any other American citizens? A. Yes.

Q. In the operation of the Selective Service is there any inquiry made as to whether or not a person is a dual citizen?

A. I don't believe there is, but I can't say definitely as to what the form provides for because I haven't seen those.

Mr. Ennis: You have nothing to do with the operation of the Selective Service System, have you?

(Testimony of Andrew S. Wong.)

The Witness: No, sir. [620]

By Mr. Anthony:

Q. Do you have any figures on the number of Japanese that are in the Armed Forces that are of Hawaiian birth? A. No, sir.

Q. Your office does not have those figures?

A. You asked me whether I had those figures.

Q. No, I mean your office. When I say "you" I mean your office.

A. Of the number of those who were inducted?

Q. Who are presently serving in the Armed Forces of the United States.

A. Yes, we have.

Q. Do you have any objection to producing these?

Mr. Ennis: Your Honor please, I think that any request to produce information ought to be addressed to Counsel and not to the witness who is here to give information from the Bureau of Vital Statistics. Now, I have not interfered with the cross-examination because I want to be very lenient about it and let the witness explain anything he knows, but I think requests for information ought to be addressed to me.

Mr. Anthony: All right, I address it to you.

Mr. Ennis: I will ascertain and advise you.

Mr. Anthony: I ask Counsel to produce the number of persons of Japanese ancestry in the Territory of Hawaii that are now serving in the Armed Forces of the United States, those who are casualties, the number of persons that have been

(Testimony of Andrew S. Wong.)

evacuated from [621] the Territory of Hawaii to relocation centers, and the number of persons of Japanese ancestry that are presently interned within the Territory. That's all, Lieutenant.

The Court: The number that are in employment within military areas by the Army and Navy, is that available?

Mr. Anthony: Well, the entire population is in a military area, your Honor. That would be the figure of 124,000 unless your Honor means military reservations.

The Court: Reservations.

Mr. Anthony: I think that would be of interest, too, Army and Navy reservations. I don't believe there are any employed in the Navy.

Mr. Ennis: The number of persons of Japanese ancestry employed in the military reservations in the Territory.

The Court: Yes, not in the Territory but in the military reservations and in military work.

Mr. Ennis: Is it military reservations throughou the United States as a whole, your Honor?

The Court: No, in the Territory.

Mr. Anthony: I think your question should be a little broader than reservations. For instance, Punahou Campus has a large number of employees for the U. S. E. D.

The Court: Well, that is in the nature of a reservation at the present time. It is all under military guard there, and you've got to have a pass

(Testimony of Andrew S. Wong.)

to get into it. I would consider that a military reservation. [622]

Mr. Anthony: Very well, your Honor. (To witness): That is all. Thank you very much.

Mr. Ennis: Lieutenant, do you know of your own knowledge whether the military authorities investigated the "Volunteer" applicants of Japanese ancestry before they were accepted into that corps?

The Witness: Yes.

Mr. Ennis: They did?

The Witness: Yes.

Mr. Ennis: That's all.

Mr. Anthony: Just a minute, Lieutenant. Every person that is inducted into the Selective Service has an investigation made of him, isn't that a fact? You answer a complete form under the Selective Service?

The Witness: Yes, that's right.

Mr. Anthony: In that sense you make an investigation?

The Witness: In that sense the Selective Service individuals make an investigation; to what degree or to what extent, that may vary.

Mr. Ennis: But so far as the "Volunteer" group, before the Selective Service System was applied to persons of Japanese ancestry, do you know whether the applicants to go into this "Volunteer" group were investigated by the military authorities?

The Witness: Yes.

(Testimony of Andrew S. Wong.)

Mr. Ennis: Were some chosen and some not chosen, do you know? Unless you know of your own knowledge don't answer it. [623] Do you know whether any applicants were rejected?

The Witness: Yes.

Mr. Ennis: That's all.

Mr. Anthony: Why were they rejected, Lieutenant?

The Witness: They were rejected on the basis of possibly adverse information which might be contained on the individuals themselves, and which by their selection might have constituted a potential problem relevant to security in the Army.

Mr. Anthony: That's all.

Mr. Ennis: That's all. Thank you, Lieutenant.

(Witness excused.)

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Vol. III

TRANSCRIPT OF RECORD

(Pages 979 to 1034)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 14

LLOYD C. DUNCAN, PETITIONER,

vs.

DUKE PAOA KAHANAMOKU, SHERIFF OF THE CITY AND COUNTY OF HONOLULU

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1944.

CERTIORARI GRANTED FEBRUARY 12, 1945.

TRANSCRIPT OF RECORD
IN FOUR VOLUMES

Office - Supreme Court, U. S.
FILED
DEC 29 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944

No. 791

LLOYD C. DUNCAN,

Petitioner,

vs.

DUKE PAOA KAHANAMOKU, Sheriff, City and County of Honolulu,

Respondent.

VOLUME III

Pages 979 to 1184

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Rotary Colorprint, 55 Eleventh Street, San Francisco

No. 10763

United States

Circuit Court of Appeals

For the Ninth Circuit.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,

Appellant,

vs.

LLOYD C. DUNCAN,

Appellee.

Transcript of Record

In Three Volumes

VOLUME III

Pages 979 to 1184

Upon Appeal from the District Court of the United States for the Territory of Hawaii

Rotary Colorprint, 590 Folsom St., San Francisco

ROBERT K. MURAKAMI,

a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Will you state your name and present occupation?

A. Robert K. Murakami, Attorney at Law.

Q. When were you admitted to the bar?

A. In 1926.

Q. Where did you study law?

A. University of Chicago Law School.

Q. When did you receive your degree from the University of Chicago?

A. In the summer of 1925.

Q. Where were you admitted to the bar? [624]

A. In the Territory of Hawaii.

Q. Have you practiced law here since that time?

A. Yes, I have.

Q. In the course of your practice have you been consulted by persons of Japanese ancestry in the Territory concerning their possible citizenship under Japanese law? A. I have.

Q. In what respect has your practice in that field been? Explain it to the Court.

A. Particularly in reference to expatriation of their Japanese nationality.

Q. Persons of Japanese ancestry would come to you as their lawyer to handle their applications for expatriation from Japanese citizenship, is that so? A. That is true.

(Testimony of Robert K. Murakami.)

Q. Have you, in the course of your practice, had occasion to examine the Japanese law of citizenship? A. Yes, I have.

Q. Have you had occasion to study the Japanese law on citizenship of persons of Japanese ancestry born outside of the Empire of Japan?

A. That particularly.

Q. Have you prepared translations of the provisions of the Japanese nationality law bearing on the question of the Japanese citizenship of persons of Japanese ancestry born outside the Empire of Japan? [625] A. Yes, I have.

Q. And have you those English translations with you? A. I have.

Q. And have you the Japanese text of those laws with you?

A. Yes, I have a text.

Q. Will you explain to the Court what the Japanese law is in respect of a person of Japanese ancestry born in the Territory of Hawaii, and explain any changes that have been made in the Japanese law? A. A person——

Mr. Anthony: May I ask this witness a few questions to find out whether or not he is qualified to give this evidence?

The Court: Yes.

By Mr. Anthony:

Q. Mr. Murakami, have you ever studied Japanese law?

A. Only in the sense as a practictioner here in the Territory and getting some correspondence,

(Testimony of Robert K. Murakami.)

reading correspondence courses and reading commentaries of Japanese law, and getting whatever information available here and in the Consulate and elsewhere.

Q. You never studied in any Japanese Law School? A. No, I did not.

Q. Have you ever studied in Japan at all?

A. No.

Q. Ever been there?

A. Just for a trip, a short trip. [626]

Q. Will you tell the Court frankly whether or not you hold yourself out as an expert in Japanese law?

Mr. Ennis: I object, your Honor, on the grounds that the witness is being asked to testify about one aspect of Japanese law, not Japanese law generally.

Mr. Anthony: Well, I don't understand that an expert in foreign law can come in and say that I just know the law relating to notary public.

Mr. Ennis: On the contrary, the law is that an expert is usually qualified in one aspect of the law. I doubt that Mr. Anthony would claim that he was an expert in the patent laws of the United States.

Mr. Anthony: I don't claim to be an expert on anything. Well, I'll reframe my question, your Honor.

Q. Do you think that you are an expert on the Japanese law relating to citizenship, nationality, expatriation and those kindred subjects?

Mr. Ennis: I object on the grounds, your Honor,

(Testimony of Robert K. Murakami.)

that he is calling for a determination which your Honor should make. I think the witness is perfectly willing to state what his person is and what his knowledge of Japanese law is. He should not be asked as to conclusions whether he considers himself as an expert.

Mr. Anthony: I'm asking him if he is qualified and to tell the Court.

The Court: You asked him whether he considered himself an expert. [627]

Mr. Anthony: Well, I'll change that. I'll reframe the question. Mr. Murakami, do you think you are qualified in Japanese law to tell this Court what the Japanese law was relative to nationality, citizenship, expatriation and kindred subjects?

The Witness: I wouldn't go about kindred subjects, but I could go only to this extent that I think I can tell the Court just exactly what the situation is and what the requirements are and how it is done, etc., as to the expatriation of citizens of dual nationality from the Japanese nationality.

Mr. Anthony: Have you ever read a decision by a Japanese court?

The Witness: I have read decisions of the Japanese courts.

Mr. Anthony: Relating to nationality?

The Witness: No, not on nationality.

Mr. Anthony: Are there such things as decisions relating to citizenship and nationality under the judicial system of Japan?

(Testimony of Robert K. Murakami.)

The Witness: I should imagine so, but I don't know.

Mr. Anthony: You have never read one?

The Witness: No.

Mr. Anthony: I object to the witness testifying your Honor.

Mr. Ennis: Now, let's pursue this question of qualifications a little further.

By Mr. Ennis:

Q. Have you read the statutory provisions of the Japanese law about nationality? [628]

A. Yes, I have.

Q. Have you read Japanese treatises about the law of citizenship? A. I have.

Mr. Ennis: Now, if the Court please, questions such as the opposing Counsel has addressed to the witness may go to the weight which is to be given to the witness' testimony. But they do no go to the absolute disqualifications.

The Court: I think that is so. Apparently there is nothing before the Court on the subject. You didn't make any objection to Mr. Anthony's questions? Oh, yes. Now, the last thing was that Mr. Anthony objected to this witness testifying further on the subject.

Mr. Anthony: On the gronud that he has not shown himself to be qualified, your Honor.

The Court: Overruled.

Mr. Anthony: With all due respect to Mr. Murakami as a lawyer learned in our law.

The Court: Overruled. (To witness): Have

(Testimony of Robert K. Murakami.)

you made any study of the same subject along the same lines as to any other nation, other than Japan, any European nation, Italy, Germany, France or England?

The Witness: No, your Honor, except to the extent of reading text books concerning nationality and dual nationality, etc., written by American text writers.

The Court: Dual nationality, is it a thing that is peculiar [629] to Japanese laws or is it general in the laws of other countries or any country?

The Witness: I understand that it is not peculiar to Japan. As a matter of fact, it was taken by Japan from continental Europe.

Mr. Anthony: Japanese civil code was based upon the German civil code, was it not?

The Witness: That is so.

Mr. Anthony: That is a civil law country?

The Witness: Yes.

Mr. Anthony: The same as the Italian law, then, or German law?

The Witness: That is true.

The Court: French

The Witness: French.

The Court: You may proceed.

Mr. Ennis: I request to be marked Respondent's Exhibit No. 10 for identification these four sheets purporting to be English translations of provisions of Japanese law on nationality.

(Received and marked "Respondent's Exhibit No. 10 for identification.")

(Testimony of Robert K. Murakami.)

By Mr. Ennis:

Q. Mr. Murakami, I show you Respondent's Exhibit No. 10 for identification. Are these English translations of the provisions of the Japanese law prepared by yourself? (Showing witness several typewritten sheets of paper). [630]

A. They are.

Q. From the Japanese text?

A. From the Japanese text.

Q. Now, will you state to the Court and explain what the Japanese law is and any change that has been in the Japanese law on the Japanese citizenship of persons of Japanese ancestry born outside of the Empire of Japan, and particularly in the United States?

A. The law, the nationality law of Japan prior to 1916 was that a person that was born of a Japanese father was a Japanese, whether he was born in Japan or in the Territory of Hawaii. In 1916 there was an amendment which made it possible for a person born in a foreign country, that is, a foreign country from Japan to expatriate or give up his Japanese nationality by taking steps. But that was only limited to those between 15 and 17 I think. But the amendment which is now in effect, and the nationality law as revised now and in effect is that—it came about in 1924, the law of 1924—it made a drastic change in the nationality law of Japan in this respect, that a person born, say, in the Territory of Hawaii of a Japanese father will not be a Japanese, that is, not be a Japanese subject

(Testimony of Robert K. Murakami.)

unless within 14 days from the date of the child's birth his birth is registered with the Japanese Consulate, and at the same time there is shown that there is an indication with the report of birth that the child shall retain his Japanese nationality. If such report and such indication of intention to retain Japanese nationality were [631] not manifested and reported to the Japanese Consulate, then retroactive to the date of the child's birth this Japanese child never acquired Japanese nationality.

Q. What date was that 1924 enactment effective?

A. The act was enacted in 1924 and became effective *in* December 1, 1924. If, however, the parents reported the child's birth to the Japanese Consulate within the period of 14 days, then, of course, the child retained his dual, that is, Japanese nationality. But such child may later or the parents may later take steps to expatriate the Japanese nationality. This step, that is, this provision of the expatriation was extended also to those who were born prior to the effective date of the act, that is, those born prior to December, '24, in countries designated by the Imperial ordinance, which included the United States and five other western hemisphere countries. And so, by that revision of the nationality law, those persons of Japanese ancestry born in the Territory of Hawaii, let's say, prior to December 1, 1924, could, by making a report to the Home Ministry through the Japanese Consulate, expatriate their Japanese nationality at will, in other words, by their own volition.

(Testimony of Robert K. Murakami.)

Q. In the course of your practice, Mr. Murakami, were you familiar with and have you seen the forms of registration of births with the Japanese Consulate made out by persons in this Territory?

A. Yes, I have.

Q. And it was the practice to make them out and file them with the Japanese Consulate? [632]

A. Yes, for those parents who intended to have the Japanese nationality retained for some reason or other.

Q. Respondent's Exhibit 10 for identification, which I showed you, contains the text of these provisions of Japanese law which you have referred to in your testimony?

A. Yes, only the translation of the provisions as they now stand, that is, with the 1924 amendment.

Q. Yes.

Mr. Ennis: I offer Respondent's Exhibit 10 for identification in evidence.

The Court: Received Exhibit 10 in evidence.

(Respondent's Exhibit "No. 10" was received in evidence.)

(Testimony of Robert K. Murakami.)

RESPONDENT'S EXHIBIT No. 10

Nationality Law

(Law #66, March 16, 1899;
Amended by Law #27 of 1916;
Amended by Law #19 of 1913.)

Article 1.

A child shall be Japanese if at the time of his birth the father is a Japanese. The same is true if the father had died prior to the birth of the child but was a Japanese at the time of his death.

Article 20.

A person who shall have acquired a foreign nationality by his own wish shall lose his Japanese nationality.

Article 20, Sec. 2.

A Japanese born within a foreign country designated by Imperial Ordinance and who by virtue of birth in such country has acquired its nationality shall lose his Japanese nationality retroactive as at the time of birth unless an intention to retain Japanese nationality shall be manifested in accordance with the provisions of law. (This Article added by Law #27, 1916; amended by Law #19, 1924.)

Any person whose Japanese nationality has been retained in accordance with the provisions of the preceding section, or, any person who, by virtue of his birth prior to the designation as provided for in the next preceding section, within a designated foreign country, has acquired the nationality of such foreign country, may expatriate his Japanese na-

(Testimony of Robert K. Murakami.)

tionality on his own desire if he has such foreign nationality and has his residence within such country.

Any person who shall have expatriated in accordance with the provision of the next preceding section shall lose his Japanese nationality.

Census Registration Law

Article 69.

A birth shall be reported within 14 days.

x x x x x

Home Ministry Ordinance #26; Nov. 17, 1924
Regulations for the Enforcement of the Nationality Law.

Article 2.

If, in accordance with Sub-section 1, Section 2, Article 20 of the Nationality Law, retention of Japanese nationality is intended, the person required to report a birth pursuant to Paragraph 1 or Paragraph 2 of Article 72 of the Census Registration Law Shall report and indicate such intention together with report of birth within the time prescribed in Article 69 of the Census Registration Law.

x x x x x

Imperial Ordinance #262, Nov. 17, 1924

Pertaining to Designation of Foreign Countries under Sub-section 1, Section 2, Article 20, Nationality Law.

The following foreign countries are hereby designated in accordance with Sub-section 1, Section 2, Article 20 of the Nationality Law.

(Testimony of Robert K. Murakami.)

1. United States of America
2. Argentina
3. Brazil
4. Canada
5. Chile
6. Peru

Supplementary Rule

This Ordinance shall take effect on December 1, 1924.

[Endorsed]: Filed 4-8-44.

Mr. Ennis: That's all, Mr. Murakami. Just a minute, I think Mr. Anthony wants to ask a question.

Mr. Anthony: No, no questions.

(Witness excused.)

Mr. Ennis: I would like to say this for the record, your Honor, that without any reflection on Mr. Murakami, we would be glad to supplement his testimony and the remarks of the Chief Justice of the United States in the Hirabayashi case, which are in the same tenure as his testimony, by a professor of any Japanese law institute available. But, of course, under the war conditions that kind of testimony, which Mr. Anthony would prefer, is not available.

Mr. Anthony: Oh, yes.

Mr. Ennis: That is all the testimony the Government has at [633] this time, your Honor. If we might go on Tuesday morning at nine o'clock——

Mr. Anthony: I have a few questions that I would like to ask. I see Captain Wickhem some place and I wonder if I could ask him a few more questions about Commissioner's duties?

J. FRANK WICKHEM, Captain U. S. Army,

a witness in behalf of the Respondent, having previously been sworn, resumed and testified as follows:

Recross Examination

By Mr. Anthony:

Q. You have already been sworn, have you not, Captain? A. That's right.

Q. Do you have available a copy of the General Orders? A. I do not.

Mr. Ennis: We have a copy.

Mr. Anthony: I mean for him to use.

Col. Slattery: Here is a printed copy. (Handing Mr. Anthony a printed document) (Mr. Anthony hands same to witness)

Q. Will you please turn to General Orders No. 2 and examine that, Captain? A. Yes.

Q. Paragraph 3.01 states the jurisdiction of the Provost Court. I'd like to know, Captain, first, whether or not the Provost Court takes jurisdiction in all criminal cases involving the Armed Forces?

A. That's right, Mr. Anthony, except in those

(Testimony of J. Frank Wickhem.)

cases where [634] the Commanding General may relinquish jurisdiction.

Q. And that is?

A. That pertains to traffic cases.

Q. Just traffic cases?

A. Traffic cases, that's right.

Q. How about crimes like murder and theft?

A. Not in the Provost Court.

Q. Not in the Provost Courts?

A. That's right.

Q. That is handled in a Courts-Martial, is that correct? A. Yes.

Q. In an agreement between the Territorial Courts and the Army and Navy even before the war? A. That's right.

Q. So that your jurisdiction over military personnel only relates to traffic cases?

A. That's right, traffic cases, and also——

Q. Violations of General Orders?

A. Yes, violations of General Orders, that's right.

Q. How do you determine what a traffic case is?

A. Well, violations of the Territorial traffic statutes or the revised ordinances, the revised traffic code.

Q. How about if a guy is guilty of reckless driving, a violation of the Territorial statute, where would he be tried?

A. You are referring now to a member of the Armed Forces?

Q. Yes. [635]

(Testimony of J. Frank Wickhem.)

A. He'd be tried in a Provost Court.

Q. You call that a traffic case? A. Yes.

Q. Suppose along with that incident you have a case of criminal neglect resulting in homicide?

A. That would not be tried in a Provost Court.

Q. Where do you find that in the General Orders?

A. It is not in the General Orders; it is just a matter of interpretation.

Q. Now, in regard to the trial of civilians, what is the language in the Orders that gives the jurisdiction over to the Provost Courts for the trial of civilians?

A. The language in the General Orders is that any violation of General Orders during blackout, to try civilians for any violations of a General Order and for traffic offenses during blackout.

Q. Suppose the civilian is guilty of reckless and heedless driving during blackout?

A. He is tried in the Provost Court.

Q. Suppose along with that offense there is a resulting homicide during blackout, criminal neglect, where is he tried?

A. Well, it has never come up, Mr. Anthony, but I'd say offhand that he'd be tried in the civil courts.

Q. Is there anything in the orders that would give you any guide to that?

A. No, that's right, there isn't. [636]

Q. You've got to interpret the words "traffic offenses", is that right? A. That's right.

(Testimony of J. Frank Wickhem.)

Q. That may mean a felony and it may mean a mere misdemeanor? A. That's right.

Q. And it's your job to make that interpretation, is that right? A. I'd say, Yes.

Q. And you sort these cases out and some of them will go to your Courts and some will go to the Civil Courts? A. That's right.

Q. How about the crime of murder by a civilian during blackout? A. No.

Q. By "No" you mean that is not tried in the Provost Court?

A. That's right; it goes to Civil Courts.

Q. In other words, in order to get down in the Provost Court you've got to do one of two things, either violate a military order——

A. That's right.

Q. ——or do something in connection with traffic?

A. Or an order of a Military or Naval Commander.

Q. Yes. Those three things?

A. That's right.

Q. And whether or not you have committed any crime or offense that relates to traffic depends upon your determination? [637]

A. That's pretty generally true.

The Court: When was the Naval Commander brought in?

The Witness: In General Orders 2.

The Court: Two?

The Witness: Yes, your Honor.

(Testimony of J. Frank Wickhem.)

The Court: Well, such orders of the Naval Commander, have they been published or otherwise promulgated to public notice?

The Witness: Yes, your Honor. That would be like a speed law on the Pearl Harbor Naval Reservation. Those orders are published and also the signs are up.

By Mr. Anthony:

Q. Captain Wickhem, the General Orders, are they published?

A. They have been published, Mr. Anthony, in the papers.

Q. Is there any authority for their publication that you know of?

A. No, I don't know that.

Q. Do you know whether or not the newspapers publish these without charge?

A. No, I don't know in regard to the compensation, Mr. Anthony. I know they did appear in the papers.

Q. That's a fact, is it not, that on many occasions they appear after they have been issued?

A. I think that it is released to the press simultaneous with its enactment, when it is released it is also given to the press immediately.

Q. Are you sure about that? [638]

A. Yes, I have been told that, Mr. Anthony.

Q. How many people are in the Office of the Military Governor?

Mr. Ennis: Objection, it is irrelevant.

(Testimony of J. Frank Wickhem.)

Mr. Anthony: I don't think it is irrelevant at all. This is a new system of administration of justice in Government, and I think we ought to have some facts about it.

Mr. Ennis: If the Court please, the Office of the Military Governor has a great many duties that are not related to the Provost Court system, I think.

The Court: Sustained.

By Mr. Anthony:

Q. How many Provost Judges do you have?

A. We have four on this island, and four on the other islands; eight. And then I think there are at least one or two more, Mr. Anthony, who are qualified to sit who are not sitting.

Q. These Judges have clerks?

The Court: What do you mean by "qualified"?

The Witness: I mean they have been appointed, that's right, they have just been appointed and named.

Q. Who appoints them?

A. The Military Governor.

Q. By that you mean General Richardson?

A. That's right, by General Order.

Q. And does he pass on the qualifications of these Judges?

A. I think that they are investigated very carefully, and [639] that Colonel Morrison reports to General Richardson the man that he intends to recommend, and General Richardson in a general way knows his qualifications, but I won't say that he knew them specifically.

(Testimony of J. Frank Wickhem.)

Q. That is, the individuals are investigated by Colonel Morrison who in turn makes a report to the General?

A. That's right, and when I say Colonel Morrison, for example, I reported to Colonel Morrison about certain men, and he asked me about them, and I told him about their legal background, their duties in the Army and why I thought they'd be qualified to sit. And I'm not the only source of information; he gets information, the same information, from other sources.

Q. Prior to your appointment, was it the practice to have lawyers sitting on these Courts?

A. Yes.

Q. In a few instances?

A. Yes, Colonel Baroff was a practicing lawyer.

Q. He was a recent appointment, however, fairly recent?

A. Well, it was 1942, I think early in 1942, Mr. Anthony.

Q. Is it a fact that a large number of those Judges had no training in the law, isn't that a fair statement?

A. No, I don't think that is a fair statement. I think that most all of the Judges who have sat in the Provost Courts had a legal background, Mr. Anthony. Now, since I've been down there there are only two, as I said yesterday, who are not lawyers in civil life. [640]

Q. How about these military commissions?

A. The military commissions?

(Testimony of J. Frank Wickhem.)

Q. Yes.

A. I am not familiar with them.

Q. Like that commission that tried Saffrey Brown—were there any lawyers on that Court?

A. I'm not familiar with that commission, Mr. Anthony.

Q. When did you take over your office?

A. July, 1943.

Q. 1943? A. That's right.

Q. And you don't know anything about the qualifications of the Judges before that, do you?

A. Yes, I do, because prior to that time, when I was in the Judge Advocate's Office at Shafter, I used to come down and sit on the bench.

Q. Do you remember Purcell, who used to sit down here? A. Not since I've been here.

Q. At Shafter, Major Purcell?

A. No, I don't recall any Purcell, not in 1942 or 1943, Mr. Anthony.

Mr. Anthony: That's all.

Redirect Examination

By Mr. Ennis:

Q. Captain Wickhem, will you state the qualifications of some present Provost Court Judge?

[641]

A. Well, Lt. Col. Newkirk is the Provost Judge sitting in Honolulu. He is a practicing lawyer, admitted to the Supreme Court or to the state bar in Illinois, to the Federal District Court, I think it is the Southern District of Illinois. He is

(Testimony of J. Frank Wickhem.)

a member of a firm of lawyers in Illinois who have an "A" rating in Martindale's. He has been, I'd say, a practicing lawyer there for about 15 years.

Lt. Col. Jones, who sits on the Island of Kauai, was just prior to his coming in to the Army—I think they referred to them as District Judges in Utah. It is the trial Court of Record. It would correspond to the Superior Court in California. He got his leave of absence from that judicial position to go into the Army. He is a man of some 48 years of age, I guess, and has been practicing law for—this is an estimate, your Honor—but I imagine some 20 years.

Frank Hustace, Captain Hustace, who sits in Hilo, is a graduate of the Harvard Law School. He has been a Deputy City and County Prosecutor in the City and County Attorney's Office of the City and County of Honolulu, and was very instrumental and helpful in formulating and compiling the present revised ordinances that are in use in this city.

Captain Rohrer is a man of about 45 years of age; just prior to coming into the Army he was a deputy in the City Attorney's Office in the City of Los Angeles and has been practicing law. He is a graduate of the law school of the University of California, has been a practicing lawyer in the City of Los Angeles since [642] about 1928.

Colonel Du Pree is a regular Army officer. He sits at Schofield, or rather I should say he sits at Pearl City. Now, his experiences, I noticed in

(Testimony of J. Frank Wickhem.)

his biography that he has acted in the Judge Advocate's Department in the Territory, was also an assistant Provost Judge in Germany during the time of the occupation. Other than that, I don't believe he has any particular legal background.

The Judge on Lanai is a civilian, Mr. Carlson. Now, he has acted in that capacity ever since the blitz. I believe that the cases on Lanai won't run over—again this is an estimate—but I'd say 20 a month.

The other Provost Judge is Lieutenant Klatt, and he sits at the Keneohe Air Station. He is a man about 48 years of age; he was admitted to practice in the State of Illinois and has practiced law in Illinois, in Peoria, Illinois, for a period of some 12 or 14 years prior to coming into the Army.

Of course, you have had an opportunity to see Judge Mundo on the stand and to get his——

Mr. Anthony: What do we have here, a general specification, your Honor? Of course, you had an opportunity, but I object to the witness——

The Witness: All right, the one——

Mr. Anthony: Just a minute. I object to the witness doing anything but answering questions.

The Witness: May I answer as to the last Provost Judge, [643] your Honor?

The Court: That's the one you are talking about—yes.

The Witness: Judge Mundo is the last one.

Mr. Ennis: We had his qualifications, yes.

(Testimony of J. Frank Wickhem.)

The Witness: Yes, I just want to refer to the fact that he was the only one I omitted.

The Court: Judge Mundo is in Honolulu?

The Witness: Lt. Col. Newkirk sits in Honolulu.

The Court: That's the one you didn't mention?

The Witness: No, I mentioned him as the first one.

By Mr. Ennis:

Q. Captain Wickhem, is it a fact that Paragraph 3.01 of General Orders 2, as it appears in this printed form which Counsel refers to, has since been amended to strike jurisdiction over civilians between the beginning of darkness, as defined in the regulation, and the beginning of blackout?

A. That's right.

Q. Will you explain that revision?

A. Traffic—after the amendment was made to paragraph 3.01, practically the only offense by civilians during the hours of darkness—that is, one half hour after sunset and prior to 10 o'clock, and from one half hour before sunrise or rather from 5:30 to one half hour before sunrise—during those hours the only traffic offenses that are left, as far as civilians are concerned are speeding and it used to be parking, and of course, parking now has been amended, and lights. Those were practically the only offenses left as far [644] as civilians are concerned.

Q. To be tried in the Provost Courts?

A. Yes, during those hours of darkness.

(Testimony of J. Frank Wicklhem.)

Mr. Anthony: There is nothing to prevent the Military Governor from getting out an order and making the crime of assault and battery triable in Provost Courts, is that right?

Mr. Ennis: I object on the ground that it is a hypothetical question.

Mr. Anthony: Precisely, they get out an order—

Mr. Ennis: I object to Counsel testifying.

Mr. Anthony: I'm not testifying; I'm stating what is in this record. Every time the Office of the Military Governor gets out an order that's automatically triable in the Provost Court, and it may cover any subject that is contained in the order. That is a fact, is it not? Any military order can enlarge the offense beyond what now exists, at any time.

Mr. Ennis: I object on the ground that it is hypothetical and argumentative and asking for a legal conclusion.

The Court: Well, the witness has given his interpretation of the Governor's orders, and I think it is a fair enough question.

The Witness: They could.

Mr. Ennis: Exception.

The Witness: They could enlarge the jurisdiction, Mr. Anthony, although there has been an agreement as to the division of powers in compliance with the proclamation of March 10, and there has always been rigid adherence to that. And I would doubt if there [645] would be any general order which would violate that division of authority.

(Testimony of J. Frank Wickhem.)

By Mr. Anthony:

Q. I believe that you said that the Territorial law in general was followed in regard to punishment?

A. There is a general order which says that the punishment shall be commensurate with the offense, and also the General Orders say that on the whole the Territorial law will be used as a guide.

Q. Guide? A. That's right.

Q. The Provost Courts are not limited to the punishment prescribed in any written law?

A. No, they are not, Mr. Anthony.

Q. Can you explain to the Court how it was that the Petitioner in this case was given hard labor?

A. How it was he was given hard labor?

Q. Yes.

A. Not in the mittimus. It says nothing about that. No, I can't explain that.

Q. That was just an error, was it?

A. Well, I won't say that. I don't know anything about the facts in that particular situation. I know of it.

Q. You are the Commissioner?

A. I know it does not prescribe hard labor.

Q. That's right. And under your system you are supposed to say in the mittimus whether or not the man is to be confined [646] at hard labor, is that a fact?

A. That's right. As a matter of fact, I in-

(Testimony of J. Frank Wickhem.)

quired about that. I didn't know that his job was changed until the testimony came out here in Court.

Q. I see. Captain Wickhem, do you fix policies in regard to punishment other than punishment prescribed by law or which may be considered punishment from which written laws are used as a guide, or such as the donation of blood or anything like that?

A. No, there has been no punishment exacted to my knowledge at any time since I have had connection with the Provost Courts.

Q. That policy was abandoned before you became Provost Judge?

Mr. Ennis: I object on the ground that there is no testimony that there was any such policy.

Q. You recall when part of the punishment used to be donation of blood here in the Territory?

A. I have heard about that.

Q. Well, you know that's a fact, don't you?

A. Purely through hearsay; not while I've been here. That happened before I was in the Army. It didn't happen while I was in the Army, in any way, shape or form.

Q. Would your records show that?

A. I don't know that.

Q. Do you keep records of the number of pints of blood or anything like that?

A. I have never seen any such records. [647]

Q. And how about bonds that were ordered to be purchased?

Mr. Ennis: Objection.

(Testimony of J. Frank Wickhem.)

Q. As a part of the sentence—do you keep records of that?

A. There has never been any sentence pronounced since I have been connected with the Provost Court like that.

Q. You are familiar with the fact that prior to your connection with the Provost Courts there have been such sentences?

A. Only through newspaper testimony and conversations that you have had here. I don't know it to be a fact.

Mr. Anthony: That's all.

By Mr. Ennis:

Q. Captain Wickham, a sentence which a Provost Judge may give is regulated and restricted by the General Orders, is not that a fact?

A. Just a maximum restriction of $5,000 and five years, and General Orders 2 makes a maximum of $200 and two months.

The Court: What does that relate to?

The Witness: To labor, your Honor, absenteeism.

Mr. Ennis: That's all, Captain. Thank you.

Mr. Anthony: Thank you.

(Witness excused.)

Mr. Ennis: That's all we have, your Honor.

The Court: Is there anything else before the Court, Mr. Clerk?

The Clerk: No, your Honor.

The Court: Counsel have nothing further that

they wish to [648] present at this time, I take it?

Mr. Ennis: No, your Honor.

The Court: The Court is adjourned as to this case until Tuesday morning, April 11th, at 9 o'clock.

(The hearing adjourned at 10:38 o'clock, a.m.) [649]

Honolulu, T. H.
April 11, 1944
9:03 o'clock, a.m.

(The hearing was continued.)

The Clerk: Habeas Corpus Docket No. 298, in the matter of the application of Lloyd C. Duncan for a Writ of Habeas Corpus, case called for further hearing.

Mr. Ennis: May we proceed?

The Court: You may proceed.

Mr. Ennis: General Richardson, will you take the stand, please?

LT. GENERAL ROBERT C. RICHARDSON, JR.,
United States Army,

a witness in behalf of Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. General Richardson, will you state your full name and your present position?

A. Robert C. Richardson, Jr., Lt. General, United States Army, Commanding General of the

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Army ground and air forces in the Central Pacific area.

Q. When did you enter the Army, General Richardson? A. In 1900, June 19, 1900.

Q. General Richardson, will you state very briefly and in chronological order, from 1900, the military positions and [650] experience that you have had?

A. After four years at the U. S. Military Academy at West Point, New York, I was assigned to the Cavalry in the Philippine Islands. I then returned to the United States and was stationed in San Francisco in command of "I" Troop of the Fourteenth Cavalry. For the next four years I was instructor at the U. S. Military Academy at West Point, followed by a tour in the Philippine Islands until 1911. I returned to Texas where I served for three years in the Cavalry on the Texas border, returning again to the U. S. Military Academy as an instructor until the outbreak of the war.

I was then Aide-de-Camp to Major General Thomas H. Barry and was with him and observed in the early part of the European War on the western front. I was subsequently detached in December, 1917, to the American General Headquarters and served in the "G-3" or operations section of GHQ.

I was in command of General Pershing's Advance General Headquarters at Lyon until the Armistice, at which time I was sent to command the City of Trier, Germany. For quite awhile I was in the

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)
Allied Peace Conference, returning to the United States in 1919 for a tour of the General Staff. I then returned to the Philippine Islands in 1921, where I served for two years and one-half on the General Staff of troops.

I was next detached to the Command and General Staff School at Fort Leavenworth, Kansas, followed by two years and [651] a half in Paris at the Ecolo Superieure de Guerre, or the French War College, from which I was sent as Military Attache of the American Embassy at Rome.

I then returned to Fort Riley, Kansas, for a tour of duty with the Cavalry—in which I was detached—and the U. S. Military Academy as Executive Officer; and subsequently appointed Commandant of Cadets, in which capacity I served for four years and three months. I then went to the Army War College, Washington, D. C., for a tour of duty, followed by a tour on the War Department General Staff in the Military Intelligence.

Q. What year was that?

A. 1934-35. I was then appointed Commanding Officer of the Fifth U. S. Cavalry, Fort Clark, Texas, which regiment I commanded for two years and a half. I was then appointed Brigadier General of the Line and assigned to the command of the Second Cavalry Brigade at Fort Bliss, Texas.

I was next detached to command the Cavalry School at Fort Riley, Kansas. For twenty months I served in that capacity, was appointed a Major

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)
General and assigned to command the First Cavalry Division at Fort Bliss, Texas.

I was next detached in January, 1941, to organize the Bureau of Public Relations of the War Department for the Secretary of War. After six months in that capacity, I was appointed Commanding General of the Seventh Army Corps, in which capacity I served for twenty-two months.

[652]

I was then detached and sent to Hawaii and appointed Commanding General, Hawaiian Department. My title was subsequently changed to Commanding General, Central Pacific Area.

Q. General, will you describe the geographical limits of the Central Pacific Area?

A. The Central Pacific Area includes a sector of the Pacific—the responsibility of the Commander-in-Chief, Admiral Nimitz—in general terms it is a large sector of the ocean north of the equator.

Q. And what are its limist west and east?

A. It extends to the coast of California, to Japan.

Q. And is that Gentral Pacific Area designated as your command by the War Department?

A. It is.

Q. And in addition to its designation by the War Department is it also part of the command designated by the Joint Chiefs of Staff?

A. It is. It is one of the subdivisions of the Pacific Ocean areas which have been delineated by the directives of the Joint Chiefs of Staff.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Q. And it includes the Territory of Hawaii?

A. Yes, it does.

Q. At what time was the Central Pacific Area created?

A. On August 14, 1943. Pardon—correction. I was appointed Commanding General of the Central Pacific Area on [653] August 14, 1943. The Pacific Ocean areas were created by direction of the Joint Chiefs of Staff at some time long prior to that, when Admiral Nimitz was given his directives.

Q. Prior to setting up the command, the command of the Central Pacific Area, what was the military command, the Army command, which included the Territory of Hawaii?

A. The designation of the Army command was the Hawaiian Department.

Q. And military command in the Territory on December 7, 1941, was designated the Hawaiian Department, is that correct?

A. The Hawaiian Department, correct.

Q. Will you describe very briefly as a basis for your testimony, General, what the Territory of Hawaii is within your Central Pacific area, its geographical nature generally?

A. The Territory of Hawaii includes these islands of the Hawaiian group beginning with Kauai and ending with Hawaii; in other words, Kauai, Maui, Lanai, Molokai, and Hawaii—Oahu, of course.

Q. For the purposes of the conduct of the war, General, does this Central Pacific Area, including

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

the Hawaiian Islands, possess and has it been given any military designation other than the Central Pacific Area? I mean, has it any other designation in military parlance in terms of carrying on war activity here? [654]

A. Yes, this whole area under the command of the Commander-in-Chief of the Pacific Ocean Area, Admiral Nimitz, is an active theatre of war, and within that theatre of war is the theatre of operations, of which the Hawaiian Department is a part.

Q. Will you explain what you mean, from the military viewpoint, by the terms "active theatre of war" and "theatre of operations?"

A. Well, an active theatre of war is that area which is or may become actively involved in the conduct of the war. A theatre of operations is that part of an active war theatre which is needed for the operations either offensively or defensively, according to the missions assigned or a combination of the missions; and it includes also the administrative agencies which are necessary for the conduct of those operations.

Q. From the viewpoint of military science and study, so that we may see the situation of the Territory in the war picture in the Pacific, will you state very generally the strategic and tactical significance of the Territory of Hawaii in the Pacific war situation?

A. From a military point of view, this group of islands is the keystone of the defense of the

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

western coast of our country; beginning in Alaska, with Alaska and the Panama Canal, it forms a large bastion. The security of our west [655] coast depends upon the security of this bastion. And the Hawaiian Islands, of which Hawaii is the most important one, is the apex of this bastion. And, therefore, the preservation of those, and the security of this area, is paramount to the strategic success of our Army and Navy, and also for the defense of our country. Should it be penetrated at any time, we would suffer materially, both tactically and materially, and it would interfere very seriously with the prosecution of the war.

Q. Now, General, turning from the description of the Territory of Hawaii and the Central Pacific Area, will you state what duties have been assigned to you by the War Department and the President in connection with your command here as the Commanding General of the Central Pacific Area?

A. Under my directive of the War Department I have been assigned to command all the ground and air troops of the Army of the Central Pacific Area. And in addition to that, I am to execute and supervise any operations which may be assigned to me by the Commander-in-Chief of the Pacific Ocean Areas. I was also designated, I was also given the mission and designated as Military Governor of Hawaii in my War Department order, which assigned me to this command by order of the Secretary of War.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Q. Now, in addition to your delegation of authority from the War Department, did I understand you to say that you [656] also have authority delegated to you by the Commander of the entire Pacific Area, Admiral Nimitz?

A. Yes, sir, as Admiral Nimitz has responsibility for the entire Pacific Ocean areas which includes, of course, the Central Pacific area, as a segment of his command. He has delegated to me the immediate responsibility for the security of these islands.

Q. In connection with your official duties to carry out the military mission you have described, have you become familiar with enemy actions in your command and in the Territory of Hawaii?

A. I have attempted to familiarize myself with every single detail of the enemy action.

Q. Could you state in a general way what enemy actions have occurred and are probable and likely in this Territory?

A. We are all very familiar, of course, with the tragic events of December 7, 1941, when the Japanese suddenly attacked the Hawaiian group. We know that it is still within their capability to make an attack of that nature. They are also capable of coming here in submarines and executing raids of a various character, with a view of destroying our installations or obtaining information which is much more valuable than the destruction of any installations.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Q. Well, now, General, insofar as the requirements of military secrecy will permit, could you state to the Court [957] any recent enemy action in this Territory?

A. I might review for you, in order to give you the complete picture, the activity of the Japanese in the Hawaiian group. Subsequent to Pearl Harbor there was great submarine activity in these waters. Between December 7th and December 31st, there were innumerable reports of the presence of submarines. The records will show that between December 7th and December 31st Kahului was shelled twice by submarines. On December 30th, the Port of Hilo was shelled, December 30, 1941, by enemy submarines. And on the following day, December 31st, the submarines shelled Nawiliwili, Kauai. On January 28, 1942, an Army transport, the "Royal T. Franks," was sunk by a torpedo from an enemy submarine on a channel between Kanai and Maui. Subsequent to that date there have been recurrent reports and verifications of the presence in these waters of enemy submarines.

To illustrate: Since last March, one year ago, we have official records of the presence of 30 submarines in these waters, the last one on March 10, 1944, just a few weeks ago, within 20 miles of Oahu. In addition to that, there has been aerial activity in this area since the attack upon Hawaii. We have definite records of the presence of two airplanes, at least, and possibly two others. We know that

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

on March—the night of March 4th and 5th, an enemy plane or planes——

Q. What year is this, General?

A. 1942, nearly two years ago—launched probably from [658] enemy submarines, and dropped bombs on Tantalus Hill. As recent as October, 1943, just prior to the Gilbert operations, an enemy plane, probably launched from a submarine, reconnoitered Pearl Harbor at night at a time when the entire fleet was concentrated in those waters preparatory to the sortie for the attack upon the Gilbert Islands.

Q. From a military point of view, is secrecy a prime element of success in such an attack?

A. It is of paramount, transcendent importance. And, even though that airplane did no damage to the Island of Hawaii nor disturb the activity and the routine of life here, had it succeeded in getting the information of the presence of this fleet and transmitting that information to the enemy, it might have caused more damage than the construction of this whole port.

Q. From the viewpoint of the military authorities, do the activities that you have mentioned, air and submarine reconnaissance, constitute the waging of war in this Territory?

A. In my judgment as a soldier, I consider that they do.

Q. Now, do your official responsibilities here require you to make military appraisals of the pos-

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

sibility of an attack or an invasion against these islands?

A. Yes, we not only make appraisals but we make them constantly and periodically. We make what is known as an [659] estimate of the situation, which I might explain from a military point of view as estimating the capabilities of the enemy and what you might do to him in view of your assigned mission; the means that are at your disposal for that execution, and the means at the disposal of the enemy for the execution of his mission, taking into consideration, of course, all factors of terrain, weather, etc. We then analyze the lines of action which are open to the enemy and the lines of action that are open to ourselves, and weighing those two we come to a decision. That is know as an estimate of the situation.

Q. Well, have you applied that military function of estimating the military situation to your command here? A. I have.

Q. Well, now, would you state, General, some of the major military factors that enter into your estimate of the military activity that is required of you here?

A. Being charged, as I am, with the immediate security of the Hawaiian Islands, under the directive from the Commander-in-Chief, I naturally try and project myself into the mentality of the Japanese commanders, in order to deduce from their estimate as to what they might do and why they should wish to come to Hawaii and launch an at-

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

way against these islands. From that deduction I might point out certain factors which should be very attractive to the Japanese High Command.

In the first place, we have here in the Hawaiian Islands the United States fleet, based in Pearl Harbor. This is a [660] large body of water which offers to the fleet a safe anchorage for rest, recuperation, but above all, for repairs; it contains, as you know, dry docks, storage facilities, large shops, fuel, supplies, and everything that is necessary for the fleet to prosecute this war.

Therefore, if the Japanese could cause any damage to this installation or cause any damage to the fleet units when they are at anchorage at the base, they would succeed in interfering to a disastrous degree with the prosecution of this war. Pearl Harbor today is the most attractive target for an enemy, and in waging war with the Japanese it is in my judgment the most remunerative target in the world today. In addition——

Q. Well, now, are there other military targets in addition to the target available here?

A. In addition to the transcendent importance of the security of Pearl Harbor and the fleet, the Japanese know perfectly well that we have here a large air base, that we have built many fields, that we are concentrating planes at this base, that we are building up our supplies for the prosecution of the war, that Oahu is the center of our communications system for the Pacific area. And, therefore, putting all of those factors down and

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

weighing them, it is such a tempting prize that I know they are not overlooking it now. It may be held in abeyance for the moment, its capture or the [661] attempted capture, but it is certainly in the minds of the Japanese High Command.

Q. Well, do you weigh their capabilities of their approaching such a prize. Is that a factor in your judgment?

A. It is decidedly a factor. The Japanese still have the capabilities of launching an attack against this place. We have not—although we have injured the Japanese fleet, we have disturbed shipping—we have not destroyed their capabilities of attacking Oahu.

Q. Well, in view of the successes of our own fleet, General, could you explain how in your appraisal you consider that the Japanese would be able to make such an attack? Would you be more specific about that capability that you mentioned?

A. We know that the Japanese fleet has not been destroyed; it has never come to grips with our own fleet; it has suffered some damage, just as our fleet at times has suffered damage. We know they still have a number of carriers; and we know that it is well within their capabilities of launching a surprise attack against Oahu and Pearl Harbor as they did on December 7, 1941.

Q. How would the Japanese go about launching such an attack and keeping it a surprise? How could they from a military point of view keep it a surprise?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. Yes, that is perfectly possible. The Pacific Ocean is a very large area. It is impossible for our Navy to cover [662] the surface of that ocean either with surface vessels or with air. They could organize task forces, maintain radio silence, move into this area under the protection of a storm or what is known as a cold front, or a zone in which the cold air from the north meeting the south air from the warm air from the south constitutes a large zone of mist—hide in that front and approach very closely to Oahu and escape detection despite all of the technical devices which have been placed at our disposal, such as radars for the detection of such a force. These devices have their limitations. The Japanese know what they are, and would exploit them and stay out of range of our electric detecting devices.

Q. Well, now, is this cold front that you mentioned an unusual or usual weather phenomena?

A. No, that is a very usual weather phenomena. It occurs all the time; the periodicity is, you might say, regular.

Q. Now, in addition to enemy capabilities to strike from a carrier force, is there any other important way in which the Japanese enemy could attack this Territory?

A. Yes, there are several other ways in which the Japanese could attack this Territory. In the first place, they could make use of their submarines. In the new technique of warfare the use of the submarine has been highly developed. They

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

approach within hostile shores at night, launch rubber boats, send parties ashore for information. One of our greatest problems is the installation of the security of these islands, [663] and the only way that security can be maintained is by the strictest exercise of counter intelligence to prevent the enemy from gaining any knowledge of our activity on these islands, of our intentions.

Q. By counter intelligence you mean that branch of military intelligence which seeks to prevent the enemy from obtaining knowledge of your operations? A. Exactly.

Q. I see.

A. In addition to that, we have here in these islands, as you know, one-third of the population which is mixed; 33 and 1/3 of the population of the Hawaiian Islands is of Japanese blood, and therefore there is within that group potential danger of the transmission of information to people of their own race. From submarines could be launched small parties, reconnaissance parties; they could mingle with the population here, completely undetected, and obtain information which would be of such value to the Japanese High Command that it would transcend any attack launched here with a few bombs.

Q. Well, in addition to sending persons aboard for espionage purposes, are so-called commando raids or raiders from submarine feasible in your military experience?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. Those are perfectly feasible, and it is a very common practice for submarines to launch commando raids, which would attack our installations, radio, radar, supplies [664] of oil.

Q. Have our own forces used that technique of commandos from submarines?

A. We have used that to a limited extent, but we have used the technique in a very valuable way prior to the occupation of Africa.

Q. You refer to our contact with the French?

A. With the French in Africa, where all the preliminaries were arranged which meant the saving of a great many American lives.

Q. Well, now, General, you have mentioned the character of the population in this Territory. As I take it, that is a military factor in appraising the possibility of attack or invasion here?

A. It is a most decided military factor. It is absolutely necessary that the military commander in this area have some means at his disposal for controlling the movements and the activities of people whom he suspects may be potentially disloyal. Of course, my remarks do not apply to the entire Japanese population. But it would be naive to assume that in a population of 160,000 that we did not find a group of potentially disloyal Japanese. As a matter of fact, we know that some of them are not loyal to America. They have so stated when they have been brought before the internment boards. And I have been forced to put

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

them in interment [665] camps for the security of these islands.

Q. Will you explain what your internment program is and how it relates to military security?

A. Under the operation of this very modified form of martial law which exists in the Territory, we have an internment camp for interning, whether they be citizens or aliens of any blood, of those whom we suspect of disloyalty and who are necessary to be incarcerated for the security of these islands. When the finger of suspicion is pointed at any one of them, they are brought before a hearing board, which is composed of three citizens of this community. The recommendations of that hearing board are then referred to a board of officers composed of a representative of the Naval Intelligence, of the Military Intelligence, and of the F. B. I. The recommendations, then, of both of those boards are forwarded to the Office of the Military Governor, where they are reviewed and final determination passed, whether the accused be placed in the internment camp, whether he be paroled or whether he be released.

In addition to that, the record of every man in the internment camp is periodically reviewed every Thursday afternoon by the hearing board of the Office of the Military Governor. And we release or parole on an average of five or six a week. During the month of March we were forced to intern. I think it was 41; I am not sure but I have the figures. [666]

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

The Court: Which year?

The Witness: This year, sir, March of 1944, this past month.

Q. As I take it, a large number are interned, and they keep coming in and going out as you find you can parole them?

A. That is true. On the whole, we have interned since the beginning of the war 1,396, a number of whom have been sent to the mainland.

Q. Now, they include citizens as well as aliens and persons of Japanese blood or persons of other blood? A. Yes.

Q. Depending upon the particular facts that your intelligence service calls to your attention?

A. Exactly.

Q. I see. Do you find among the Japanese any particular group of citizens among whom you are likely to find persons who are not loyal?

A. As you know, the Japanese might be placed into several categories: there are the aliens, pure and simple; there are the Japanese who were born here and are American citizens; there are other Japanese who have been expatriated, and those have been born here but registered by their parents in the Japanese Consulate and upon whom the Japanese Government professes to exercise a certain degree of loyalty and allegiance.

Q. You are familiar with the group of American-born [667] Japanese educated in Japan also, are you not?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. Yes, a number of whom have been born here and have been sent back to Japan for their education, which they received, and all their impressions have been formed during their adolescent life.

Q. They are known as the Kibei?

A. Yes, that is the name.

Q. Now, General, is it your experience that in addition to finding persons whose loyalty to the United States is questionable, either in the Japanese part of the population or the other part of the population, that you do find individuals in that part of the population who are entirely loyal?

Mr. Anthony: If the Court please, I have listened at great length here to what I consider as irrelevant testimony to the issues in this case. I would like now to interpose an objection to his testimony. As the Court knows, and Counsel knows, under the Federal statute any person whom a military commander desires to have excluded may be excluded by the operation of the statute upon application made.

Mr. Ennis: If the Court please, on the particular question to which Counsel has objected, I think that it is fair that if the Military Governor, the Military Commander, in the course of his duties and in the course of his military experience generally, has not considered part of the population as having given specific loyalty, that in fairness to that [668] population that should be brought out

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

in the testimony. And it seems to me it is rather a curious question for Counsel to object to.

Mr. Anthony: I think the whole line is irrelevant, your Honor. We are trying a comparatively simple issue here, whether this Petitioner is entitled to a trial by jury for an ordinary act of assault and battery, assault and battery under the Federal statute. I don't see the relevance of this.

The Court: Well, we have entertained quite a volume of immaterial matters, without passing on it. You may proceed, General.

The Witness: I would like to say that there are thousands of Japanese here whom I believe to be very loyal, absolutely loyal. They have shown that loyalty on innumerable occasions. One of the most outstanding examples of their loyalty has been the very patriotic response to the colors of the Japanese when they were asked to volunteer. Their conduct on the field of battle in Italy leaves nothing to be desired. And it is inconceivable that their parents and their relatives, who have so willingly given these men, their sons, for the cause, should be disloyal to the United States.

Q. Now, General, in appraising the military situation, including the military factors you have mentioned, how do you wade into the picture the recent great successes of our fleet? Does not that diminsh greatly the risk of an attack which you [669] have described?

A. The reasons for the success of our fleet lies in the fact that we have been secure in this base.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.) It is from this base that the fleet is mounted, that all of our operations are mounted. It is here that is the heart of the operations of the Pacific Ocean areas. If you take any action which is injurious to that heart, you paralyze the activity of the fleet. It might seem, I know, to the layman that when the fleet is far out in the Pacific Ocean areas achieving successes in the Marshall Islands or achieving successes at Panau, that the danger is removed from Oahu. On the contrary, the danger has increased. And I know, as the Military Commander who is responsible for the security of these islands, that when the fleet returns to Oahu the danger increases; that I never go to bed at night when that fleet is here, or even any other night, without wondering. Have we taken every single precaution to exercise the authority conferred upon me in the discharge of my responsibilities?

Q. In other words, these successes, from the military point of view, in your opinion, do not lessen the danger of an attack on these islands by the Japanese?

A. Indeed, they do not, and that cannot be said too emphatically.

Q. Now, General, turning to the subject of the provost courts, which Counsel has mentioned, will you state how you [670] perceived the provost courts to be part of the military security system?

A. Well, in order to enable me to discharge my responsibilities under this modified form of martial law, and in order to achieve the security which is

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

the only reason really for the prevalence and existence of the modified form of martial law here, I am concerned, as a soldier, with my duties of security. We have been obliged to publish regulations for the control of firearms, for the control of ammunition, for the illegal possession of radios, for the illegal possession of cameras, for the institution of the curfew, for the institution of the blackout, for the ejection of undesirables from restricted areas. In order to enforce those regulations, I must have at my disposal some sort of tribunal to that effect.

Under the rules of martial law, we are authorized to appoint what is known as provost courts. These provost courts are nothing more or less than police courts. The layman might say, Why not do away with them? I personally have given great consideration to the elimination of provost courts, in order to try and carry out the directions of the President when he approved the suspension of the privilege of the Writ of Habeas Corpus and also the continuation of martial law in this Territory last, hoping that I would be able to do away with the provost courts and turn the trial of those offenses over to the civil courts. But upon examination of the circumstances I found that it is impossible for the civil courts to try [671] them because they are not offenses against Territorial laws, nor are they offenses against any known Federal statute.

Now, in rebuttal it will probably be said, but under the Organic Act the Governor can publish

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)
regulations for the punishment of infractions of these offenses.

Q. Under the Hawaiian Defense Act?

A. Under the Hawaiian Defense Act, as he did in the curfew and the blackout. But I should like to point out that in that instance—assuming that he did and that they were perfectly legal—then the violation of any of those offenses would have to be referred to a civil court for trial, with its concomitant delay. The military are the ones that protect these offenses. The military hold the witnesses, as a rule, and therefore we cannot brook a delay. And there must also be in the punishment a certain measure of retribution. The punishment must be swift; there is an element of time in it, and we cannot afford to let the trial linger and be protracted.

Again, to give another illustration, assuming that the Governor did publish regulations to this effect, I am forced then to be subjected, as Military Commander responsible for the security of these islands, I am forced to the control of another official for the enforcement of my regulations. To illustrate, well, suppose that we did turn them over to the civil authorities and that I had set the curfew, or the Governor had set the curfew at 10 o'clock. An emergency arises, and [672] I feel that it should be changed instantly to 8 o'clock. I call upon the Governor. He says, No;—not arbitrarily but because he has a very honest difference of opinion—no, I think if should remain at 10 o'clock. And he

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

refuses, therefore, to modify his order. What am I to do as Military Commander responsible for the security of these islands? The only recourse left is to reinvoke martial law, and then we are back where we started.

Q. Well, Counsel mentioned the power to set up a military area under Executive Order 9066, and to promulgate regulations in that way. Would that meet your problem of military security?

A. No, it would not, for the following reason: We will assume that we are operating under Executive Order 9066. All of the offenses which are contained therein, if violated by anyone in this Territory, must of necessity be referred to the civil courts. The Military Commander, then, is subjected to all sorts of influences, political and otherwise, as happened in the cases on the east coast in both Philadelphia and Boston, when the Commander of the Eastern Defense Command ejected what he considered undesirable persons from the areas, and he was overruled by the courts and they were put in.

Now, in an area of this character, the Hawaiian group, which is an active theatre of war and which is in the theatre of operations, it is inconceivable that the Military Commander [673] should be subjected for the enforcement of his orders to the control of other agents.

Q. Well, I take it, General, from the military viewpoint, then, you believe that your responsibility for the military security requires that you have an

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)
agency under your control to enforce your military security regulations, is that what it comes down to?

A. I do.

Q. Now, General Richardson, based upon your appraisal of the military situation, will you state your opinion as to whether or not there is imminent danger of invasion of this Territory by the Japanese enemy?

A. I shall state from a soldier's point of view the actual reality of the situation, without attempting to argue or define the academic definition of "imminent danger of invasion." We know that, at least we feel quite certain that the Japanese are totally incapable of coming to these islands with a large land-based force for the purpose of seizing and capturing it. We do not think that is within their capability at all. The time for that is past. And, therefore, if that interpretation is paramount in the mind of the layman, it may be eliminated. But you must remember that in law, as in other branches and other professions, times change. There are new developments. When that phrase was written, "imminent danger of invasion," nor the submarine, nor the airplane were in existence, nor were they ever dreamed [674] of. These two new weapons of war have enormous potentialities, and they have introduced into warfare the element of stealth, the element of surprise, and the element of speed. And, therefore, capitalizing on these new elements of warfare, our enemy, the Japanese, has at his disposal today a strong carrier force, destroyers,

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

cruisers, battleships, and airplanes, and submarines, all of which combine those elements of stealth, surprise and speed.

Therefore, they still have the capability of launching an attack, an invasion by air, an invasion by undersea, against these islands. And they have not only the capability itself; it is always impending, as long as as their capability exists, the danger impends and the danger is imminent.

Mr. Ennis: I request this be marked as Respondent's Exhibit for identification, No. 10. (Showing a typewritten document)

The Clerk: No. 11.

Mr. Ennis: No. 11, an account of an interview given by General Richardson to Eugene Burns, Associated Press War Correspondent; and as Respondent's Exhibit for identification No. 12, the somewhat abridged account of that interview published in the Washington Sunday Star of November 14, 1943.

The Court: Any objection?

Mr. Anthony: I have no objection, your Honor.

The Court: Received as Exhibit 11—there are two documents? [675]

Mr. Ennis: There are two documents, your Honor, and we might mark them as you have them presently.

The Court: Exhibit 11-a and 11-b.

(Received and marked for identification Respondent's Exhibits 11-a and 11-b.)

The Court: You don't offer these in evidence?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Mr. Ennis: I only marked it for identification.

The Court: Very well, it may be marked for identification, then.

Mr. Ennis: But, if the court please, there is no objection by Counsel,——

Mr. Anthony: I have no objection.

Mr. Ennis: ——so I do offer them.

The Court: Received in evidence, then, as Exhibit 11, a and b.

(Respondent's Exhibit 11-a and 11-b was received in evidence.)

RESPONDENT'S EXHIBIT No. 11-A

(Copy)

[In longhand]: Appeared in Star-Bulletin Nov. 13th 1943.

By Eugene Burns
Associated Press War Correspondent

Honolulu, Nov. —Oahu could be attacked by Jap planes within four months. Attacked, vital Pearl Harbor installations, army and navy hangars and supply dumps would be primary targets. If incendiaries were used some might be dropped on Honolulu's busy waterfront.

Worse, such an attack might be completed with few Jap planes shot down unless the Japs had the audacity to knife in with a repeat raid.

These are the considered opinions of military experts including Lt. Gen. Robert C. Richardson Jr., commanding army forces in Hawaii and in the central Pacific area.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

The bright spot in the dark picture is that Oahu stands ready to destroy any surface or invasion attacks, regardless of their might.

Gen. Richardson expressed these views in a conversation after studying reports about the sighting of an enemy plane the night of October 16. That enemy plane was caught in searchlight beams near Pearl Harbor and escaped.

When the writer said that he was taking bets that Pearl Harbor will be attacked within six months, the general said that he would be willing to reduce the time to four months.

How would the Japs do it is the logical question.

The general replies: Cite one example wherein a 100-plane attack has been stopped. Never. The Germans still raid London. The United Nations' planes, despite flying over hundreds of miles of enemy territory containing radio and sound detection devices, fighter planes and antiaircraft positions, still get their bombloads to their targets with a loss of perhaps five per cent. Never more than 20 per cent.

In the Pacific we recently hit Rabaul catching more than 100 Jap planes on the ground. Wake, Tarawa, Rekata bay—to name a few—are other examples of catching the Jap with his planes down. On Doolittle's Tokyo raid, the carriers Hornet and Enterprise were intercepted 750 miles away by radio-equipped patrol boats and yet Toyko did not repel the attack. Too, the Japs successfully punched

(Testimony of Lt. Gen. Robert C. Richardson, Jr.) through attacks at Pearl Harbor, Manila, Midway, Wake, Guadalcanal, Port Darwin.

Navy Day, Admiral Chester W. Nimitz, commander in chief of the Pacific Ocean areas, stressed the danger of sneak attacks saying that despite the Japs' loss of many surface ships and airplanes ". . . they are still strong enough to inflict destructive attacks at great distances."

Why should Oahu be the target?

An attack upon this fortress fits into the military scheme. It is beyond calculation what it would be worth to the enemy to cause Pearl Harbor serious damage at this stage of the war. It is the base from which we must defeat Japan. And if this naval base is destroyed it will delay the defeat of Japan. At the same time, an attack on Oahu offers the Jap carriers some hope of getting back to home base. Hitting the west coast, they might be outflanked and destroyed as was the German warship Bismarck. Hitting Aleutian bases is hardly worth risking the ships.

Too, when our battleline is drawn a thousand miles west of Pearl Harbor—as inevitably it must be—why not send an attacking force around the end of our line to slash at our operations base?

Lt. Gen. Simon Bolivar Buckner Jr., head of the Alaska Defense Command, often pressed this point home to me: "When faced by superior forces, as Japan is now, she chooses to attack rather than to fight a defensive action."

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A second Pearl Harbor would fit into the Jap commands' mental picture. For vainglorious face-lifting what could be better propaganda than a second attack on Pearl Harbor with a second set of smoke-filled pictures.

With what would the Japs make such a raid?

It is known that Japan has a first rate carrier force with which she has been extremely cautious since Santa Cruz, October 26, 1942. The chances are remote that she will risk these in ship for ship action. To date, in every action the Japs used carriers only when they had us outnumbered two to one. There remains then the sneak raid use. The Jap command is not timid. Their first six months' bold army and navy campaign wrested them one of the world's largest and richest empires. Audacity was the chief ingredient.

Why would the Japs attack in the next four months?

The Japs know North Pacific weather, much of which originates in the Jap Kurile islands and in the Japanese current north of Oahu. This warm current meeting the cold Aleutian weather breeds fogs. Within the coming four winter months, the fog belt moves closer to Oahu. December, two years ago, the Japs patiently waited for this fog, then as a storm swept south to Oahu, they sneaked in under its protecting cover.

Which part of the day would they likely come?

More than likely, morning. The Japs' carriers would be laying off during the previous day and they

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

would probably make their run-in as soon as our afternoon patrols had flown out their leg and were returning to Oahu by dark. The Jap carriers would highspeed to within 350 miles of Oahu so that no extra gas tanks on the planes would displace part of their essential destructive bombloads. Bombers launched, the carriers would reverse course quickly.

The Japs more than likely would expend their pilots—each pilot and his comparatively light, quickly built plane would be part of the bomb. With this knowledge, he would ride the bomb home! The Jap has yet to show any fine feeling about saving carrier personnel. During Pearl Harbor, many Jap pilots dropped into the water unable to reach their fleeing carriers. At Dutch Harbor, Jap pilots were heard screaming for their departed carriers. At Midway, they had no carriers left to come to. However, screening ships, instead of taking personnel off the burning carriers, turned their rifles upon their own ships and to hell with the men, according to eyewitness Ens. George H. Gay of Torpedo Squadron 8. At Santa Cruz, the last carrier battle, Lt. Cmdr. William J. (Gus) Widhelm from a liferaft saw many Jap pilots crash dive into the ocean unable to overhaul their fleeing mother ships.

What about our (deletion) sound detection devices? Will they not alert The Rock in time?

The Japs who have many of these devices know their shortcomings as well as ours. (Deletion) Following previous attack patterns, the Japs could come in low, climb quickly and come in from a fairly

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)
high altitude to avoid antiaircraft fire and interceptor planes.

Even though our pilots slept in their interceptor planes and had their motors turning it is doubtful if a sufficient number could be at an effective height in time to repel the raid before it reached the objective.

What of our antiaircraft fire?

Most coastal cities have but one cheek facing the ocean threat: Oahu has both cheeks to slap and the back of the neck. With altitude, travelling fast as Jap planes do, the Jap bombers would release their load more than 5,000 feet out from the target.

That gives AA guns xxxxxxx only a few seconds, about ten, if they are lucky before the bombs are released. And many of the gunners behind those batteries have never shot at live swiftly maneuvering targets—only at sleeves towed slowly at a straight course and at an even speed. If 10 per cent of the enemy planes were shot down before they released, it would be a high score, military officials believe.

It remains that one Pearl Harbor attack (December 7, 1941) did prove successful despite almost weekly alerts and drills; that on March 5, 1942, an enemy plane or planes dropped three or four 500-pound bombs on Tantalus Drive behind Honolulu; that on October 16, 1943, midnight, a lone, slow enemy float-type plane got within searchlight distance of Oahu and was not shot down.

Finally, because the majority of these planes got away—just as ours do after every raid on Jap

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)
bases—it means that there is a good chance that many of the Jap planes may actually get away to make a return trip to their carrier—if they find it, or a water landing near destroyers to be rescued if the Jap high command has turned soft. As Gen. Richardson has pointed out: Don't our planes come back from our surprise attacks?

Rest assured, what can be done to repeal an enemy attack is being done on Oahu. The emphasis is on speed. Oahu's military garrison sprang to instant alert when the lone raider appeared last month. Each morning, the commanding general makes his rounds and to his officers he forever drives home this point: "We can be bombed: We will be bombed: We must be ready!" -eb/november 4/1943/2:28p—

AIR
Nov. 9, 1943

Dear Mr. Turnblad:

Will you please see that the following deletions are made in Gene Burns' airmailed interview with Gen. Richardson on Hawaii's defense weaknesses? The story inadvertently was mailed without submission to navy censorship.

24th graf, starting at top of page 4 make read "What about our sound detection" etc. Eliminating 2 words "Radio and."

25th graf starting "The Japs who have many" eliminate second sentence starting "Flying x x x." Next sentence make read "Following previous at—

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

tack patterns, the Japs could come in low, climb quickly" etc. (inserting "could come in low,"

These changes, although they might appear minor, are considered very important by the navy and must be made.

Thanks,

/c/ MAC
Chief of bureau

Charles H. McMurtry
cc for cable desk

Please inform us via Press Wireless or cable when you're releasing story, so can use here and Hilo simultaneously.

MAC

[Endorsed]: Filed 4-11-44.

RESPONDENT'S EXHIBIT No. 11-B

A-4 The Sunday Star, November 14, 1943

Gen. Richardson Sees
Another Pearl Harbor
Attack in 4 Months

By EUGENE BURNS,
Associated Press War Correspondent

HONOLULU, Nov. 13.—The commanding general of Army forces in Hawaii believes another Japanese attack on Pearl Harbor is likely within the next four months.

Vital installations, Army and Navy hangars and

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

supply dumps on Oahu Island would be the primary targets. If incendiaries were used some might be dropped on Honolulu's water front.

These are the considered opinions of military experts, including Lt. Gen. Robert C. Richardson, jr., commanding Army forces in Hawaii and in the General Pacific area.

Gen. Richardson expressed the views in a conversation after studying reports about the sighting of an enemy plane the night of October 16. That enemy plane was caught in searchlight beams near Pearl Harbor, but it escaped.

Would Be Excellent Propaganda

When the writer said that he was taking bets that Pearl Harbor would be attacked within six months, the general said that he would be willing to reduce the time to four months.

An attack on this Fortress fits into the military scheme. It is beyond calculation what it would be worth to the enemy to cause Pearl Harbor serious damage at this stage of the war. It is the base from which we must defeat Japan. And if this naval base is destroyed it will delay the defeat of Japan.

For vain glorious facelifting, what could be better propaganda than a second attack on Pearl Harbor?

The bright spot in the picture is that Oahu stands ready to destroy any surface or invasion force, regardless of its might.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Might Try Sneak Raid

Japan has a first rate carrier force with which she has been extremely cautious since Santa Cruz, October 26, 1942. The chances are remote that she would risk these in ship-for-ship action. To date in every action the Japanese used carriers only when they had us outnumbered two to one. There remains then the sneak raid.

Why would the Japanese attack within the next four months?

They know North Pacific weather, much of which originates in the Kurile Islands and in the Japanese Current north of Oahu. This warn current meeting the cold Aleutian weather breeds fogs. Within the coming four winter months, the fog belt moves closer to Oahu. December, two years ago, the Japs patiently waited for this fog, then as a storm swept south to Oahu, they sneaked in under its protecting cover.

Rest assured, what can be done to repel an enemy attack is being done on Oahu. The emphasis is on speed. Oahu's military garrison sprang to instant alert when the raider appeared last month. Each morning, the commanding general makes his rounds and to his officers he forever drives home this point: "We can be bombed; we will be bombed; we must be ready."

[Endorsed]: Filed 4-11-44.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

By Mr. Ennis:

Q. General Richardson, based on your knowledge of facts, from the military viewpoint, was there an actual invasion of this Territory on December 7, 1941, by the Japanese enemy?

A. In my judgment, there was.

The Court: May I have that question?

(The Reporter read the last question.)

Q. General Richardson, I call to your attention Respondent's Exhibit 11, a and b, in evidence, and ask you to [676] examine it, and then will you state whether on any occasion prior to this trial have you testified, or rather, have you stated publicly that there was a danger of attack on this Territory? (Handing witness a typewritten document)

A. Yes, I can identify these documents as the transcript of an interview which I gave to Eugene Burns, the Associated Press Correspondent, in which I expressed the view then, in November.

Q. Last November?

A. Last November, 1943, that I thought that there was a danger, constant and impending, of the Japanese attacking Oahu.

Mr. Ennis: That is all, General. Thank you.

The Court: You will probably be subjected to cross-examination. Do you want a recess?

The Witness: No, sir; I'm perfectly all right.

Cross-Examination

By Mr. Anthony:

Q. General Richardson, would you say that Ger-

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

many is now being invaded by virtue of bombings that are being conducted?

A. Indeed, I would. I don't know how Germany could be invaded in a more catastrophic manner.

Q. And would you also say that the British Isles are now being invaded? [677]

A. They are, periodically.

Q. And, if it is true that our submarines are plying the home waters of Japan, then Japan is being invaded by us, as you used that expression?

A. I am sure that the Japanese regard the presence of our submarines in their waters as an invasion of their sovereignty.

Q. I am not asking what the Japanese think about it. I'm asking you what you think about it.

A. I think so.

Q. Then you disregard entirely the notion of an occupation by land troops in the course of an invasion? A. No, I didn't say that.

Q. You don't think——

A. Nor do I disregard that. That is one of the factors involved, but it is remote. It is remote.

Q. I didn't get that. A. It is remote.

Q. I notice, General, in the "Rules of Land Warfare," Field Manual No. 27-10—I don't know whether you are familiar with that or not. Are you? A. Well, I read it from time to time.

Q. Well, this isn't so old. It was published in 1940, General. This is what the manual says——

Mr. Ennis: What page is that, Mr. Anthony?

[678]

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Mr. Anthony: Page 74. (Reading)

"The state of invasion corresponds with the period of resistance. Invasion is not necessarily occupation, although it precedes it and may frequently coincide with it. An invader may push rapidly through a large portion of enemy country without establishing that effective control which is essential to the status of occupation. He may send small raiding parties or flying columns, reconnoitering detachments, etc., into or through a district where they may be temporarily located and exercise control, yet when they pass on it cannot be said that such district is under his military occupation."

I gather that you don't use the word "Invasion" in the same sense that they use it in the "Rules of Land Warfare."

A. I'll reaffirm what I stated in my direct testimony, that I personally am not concerned with the definition of invasion, or any of the terminology in the books. That, to my mind, is purely academic, and that's a matter to be decided by the courts. I am here to state, as a soldier, what I believe to be the conditions in this Territory which necessitate the continuance of the authority which I now exercise under this modified form of martial law.

Q. Now, General Richardson, it is true, is it not, that the front combat areas in the Pacific are some two thousand or twenty-four hundred miles away from Oahu, is that a fact?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. No, that is not a fact. I have stated in my direct testimony that a portion of the combat areas are forward or west of here, but I consider the Hawaiian Islands in the combat zone.

Q. I don't believe you said that in your direct examination, [679] General Richardson.

A. Well, then, I should like to say it on cross examination.

Q. What you said on your direct examination was that the whole area was an active theatre of war, and that Hawaii is a theatre of operations. I understand you now to say that this is a combat area.

A. Well, but the theatre of operations, Mr. Anthony, it comprises the combat area. If I might define that for you——

Q. Yes, I am very ignorant of this.

A. I don't mean to infer that you are. But the theatre of operations is a delimitation of the active war theatre. Now, the theatre of war which is designated by the Joint Chiefs of Staff is subdivided into theatres of operations. This whole Pacific area is a theatre of war, but they have theatres of operations under General MacArthur, under General Stilwell in India, and we have one under Admiral Nimitz in the Pacific Ocean. So the theatre of operations includes the terrain where the Armies operate.

Q. Is there any military parlance that indicates that portion of the earth's surface where the fighting actually takes place? A. Yes.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Q. What is that called?

A. Combat zone. [680]

Q. You would not call Hawaii a combat zone?

A. [illegible], I would, because the theatre of operations or the combat zone also includes that part assigned to your mission, whether it be offensive or defensive. We are on the defensive mission here in Oahu, whereas the fleet operates offensively from here, and some of our troops which are based here operate offensively from this base. But concurrently with its mission as an offensive base, we have a very decided mission here as a defensive base, and that defensive mission designates or characterizes it as a part of the combat zone.

Q. Then a combat zone can be an area where no shooting is going on at all?

A. Oh, yes; oh, yes.

Q. No real destruction of life or property?

A. Absolutely. In France I used to wonder sometime if we went to a picnic there in the front lines.

Q. Well, do you have any term, military term, that precisely fits the place where life and property is actually being destroyed as a result of organized warfare? A. Yes, the battle.

Q. Battle? Where is the battle in the Pacific at the present time? A. It is in various places.

Q. Well, we are informed through the communiques that we have shoved the lines west of the Marshall Islands. That, I assume, is correct. [681]

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. I don't know what communique you are referring to.

Q. The communiques of the Pacific Fleet Headquarters, which have announced the occupation by the military and naval forces of the United States the Marshall Islands. That is correct, is it not, that we now hold those islands?

A. Yes, mostly.

Q. We also hold the Gilbert Islands?

A. Yes.

Q. How far are the Marshalls from Hawaii, General, roughly? A. About 3,200 miles.

Q. Is that nautical miles or land miles?

A. Nautical miles.

Q. It is also true that we have pierced further into the defensive ring or are continually attacking Truk, according to the reports that come to us from the communiques, is that a fact?

A. We are continuing the offensive against the Japanese. The targets vary from day to day.

Q. But the targets are west of the Marshall Islands, are they not?

A. For the moment.

Q. Are there any east of the Marshall Islands?

A. At the present time I know of none except within the Marshall Islands; we have a number of targets against which we are operating daily. [682]

Q. Sometimes mopping up there?

A. I won't say it was mopping up.

Q. Well, do I understand you to say that the farther the fleet pushes the enemy west in the

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Pacific, the more danger there is here in Hawaii?

A. I do, most decidedly, and I cannot repeat it too emphatically.

Q. Well, General, that's a little difficult for a layman to understand.

A. Well, let me try and explain it to you.

Q. I wish you would.

A. I can well understand that a layman would hold the point of view that you have just expressed. But you must remember that in order to keep that fleet going there has got to be a motive force, a motor, so to speak; that motor is located here; the heart of the operations of the Pacific Ocean is right here in Oahu and is going to remain here until the end of the war. When the old knights went into battle, what did they protect first? They put armor around their hearts, because their arms and their feet and their eyes and the rest of their bodies were useless unless that heart was protected. Analogously, our aviators today have been provided with a breast plate. Why? So as to protect the vital areas of the body.

The most vital area of this whole Pacific Ocean area is Oahu, and it is going to continue to be the most vital area [683] until the end of the war. And, therefore, while it may appear to the layman that our fleet is gaining great successes as we go west, those successes are absolutely dependent upon this place, and the paralysis of this place would render completely useless that fleet which is so successful today in the West Pacific.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Q. Well, you have told us, General, that in your judgment the Japanese couldn't organize enough force in the Pacific to capture Oahu.

A. I did not say that. I said——

Q. I understood you to say that.

A. I beg your pardon. I said that the capability of the Japanese today organizing surface-borne vessels, transports accompanied by war vessels, to bring to these islands a force for the invasion of these islands is remote. We do not think that they are capable of doing that now.

Q. Is it a fact that the high tide in Japanese aggression was reached in the battle of the Coral Sea and in Midway in the Pacific?

A. I believe this, that the Japanese came down to Midway with those transports and with that navy with the idea of seizing Midway, occupying it as a jumping off place for the occupation of these islands. And, therefore, when they were defeated at Midway, their chance of organizing this ocean-borne force, of which we have been just talking, failed; and from [684] that day to this, they have never been able to recuperate sufficiently to warrant them taking the risk. But they have the capability if they want to take it. It may not be as strong as they would like to have it.

Q. It is a fact, is it not, that our Navy has increased tremendously since that time?

A. It has increased appreciably.

Q. As much as ten-fold?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. I am not in a position to answer that question.

Q. I see. General Richardson, getting down to the business of this case, I would like to have your views as to why, what is the military reason that requires the trial of what is an offense under the laws of the United States, of assault and battery, down in the provost court? What is the military reason?

A. Well, in this particular case I can well understand that the layman would think that it was an ordinary street brawl. The young man in question, however, did not attack a simple citizen walking along Kamehameha Highway or any other place in Honolulu. He interfered with the assigned duties of a sentry in time of war. He assaulted two marines. He exercised his privilege, I am told, of getting drunk, losing control of himself, and trying to force himself into one of the installation here, with which both the Army and the Navy are charged with absolute security.

Q. Who told you that? [685]

A. It was published in the papers. I read it.

Q. Very well.

A. Testimony of the marines. Therefore, Mr. Anthony, it is not an ordinary street brawl.

Q. What's the military reason, in your opinion?

A. Because we have to uphold the authority of the sentinels, which we place there. That sentinel may have shot that man. He would have been tried

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

by Courts-Martial and I have no doubt that he would have been acquitted. You must remember that when we placed a sentry on duty, that young man has very grave responsibilities. Day after day, my Judge Advocate brings up to me records of Courts-Martial where these young boys have fallen asleep on posts. It seems tragic at times to have to punish them with sentences of three to five years, but we have to do it in time of war. Upon their alertness, Mr. Anthony, depends the safety and the welfare and the lives of hundreds of others of their fellowmen. This young man interfered with the sacred duty of a sentry.

Q. Well, that is a matter of dispute in this case, General Richardson. What I am trying to get from you is, why do you think we have got to have the provost courts? You first said that on account of the delays of the civil courts. Is that one of your reasons? A. That is one reason, yes.

Q. You know that to be a fact, that there are delays in the civil courts of this Territory? [686]

A. I would not say in the civil courts of this Territory because I am not familiar with them.

Q. Well, that is what we are talking about.

A. But I say this: I draw on my general experience.

Q. Well, is there anything else besides the delays of the civil courts?

A. Oh, yes, there are many reasons why we should have control under the provost court system.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)
I thought I outlined that very elaborately in my direct testimony.

Q. One of the things you said was that you had to have some instrumentality to enforce your orders?

A. Yes, which are not offenses against the Territorial Courts or the Federal Courts.

Q. You are familiar with the fact that they could be made such?

A. But, as I said, even though they were made offenses, I would still have to go before the courts, the civil courts, which is objectionable when the offenses are of this character that rest upon security. And you place the Commander, then, of the area under the control of other agents for enforcement of his regulations when he has the responsibility of security. Are you going to take the responsibility for the security of these islands? Is the Court going to take the responsibility for the security of the fleet? Is Governor Stainback going to take the responsibility for the security of the fleet? No. I have it. And, nor my conscience and nor my duty will ever [687] make me say that I don't need the authority that goes hand in hand with my authority.

Q. You make no distinction between the trial and conviction of a non-military offense and your mission as a soldier to defend these islands and to project the offensive to the west?

A. All of these incidents, including this one, are integrated in that general security program. We

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

cannot make those refinements and distinctions when we have those responsibilities. And you would take away from me and weaken my authority.

Q. Do you think that that would interfere with the progress of the war?

A. I do, most decidedly.

Q. If I may finish the question, if a person who is charged with, I still say an offense against the laws of the United States, was tried before a jury and we found out whether or not this man was telling the truth or the marine was telling the truth. would that weaken your authority?

A. Then why don't you refer every case that goes before the police court to a jury? Have you no confidence in the integrity of the provost judges? They are very carefully selected. You must remember that those provost judges are Americans just like you, only they have on a khaki uniform. They came from civil life, and when this war is over, they are returning to civil life, and they are just as watchful and [688] jealous of the civil liberties of our citizens as are you. I am also. I, Mr. Anthony, could well understand that the layman would object to the exercise of an authority by a Commanding General through the instrumentality of a provost court, if there were any abuses. But there are no abuses in the provost courts. On the contrary, the provost courts have been administered with a super-abundance of consideration for all concerned. They have been exercised with discretion.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Q. I am sure you are painting a much rosier picture than you would if you knew all the facts.

A. I think I do know the facts, because I confer almost daily with my Executive Officer, Colonel Morrison, on provost court procedure.

Q. General Richardson, do you know any of the facts as to the operation of the provost courts before you came down here?

A. I am not familiar with what preceded my entry into this theatre.

Q. You know nothing about the meting out of five-year jail sentences for ordinary misdemeanors?

Mr. Ennis: The witness has answered the question, your Honor.

Q. General, your article in the Army and Navy Journal, you have prepared that yourself?

A. That is not a fair question.

Q. Why, I didn't mean to be unfair, but do you approve [689] the views expressed in that?

Mr. Ennis: Which article is this? (Mr. Anthony shows Mr. Ennis a photostat).

Q. Do you recognize this as your article? (Handing witness a photostat).

A. Yes, I do.

Q. And you believed the statements that you made in this article at the time you stated them, did you not? A. Yes.

Q. And you still believe them?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. I'd have to refresh my memory on the statement to which you are going to refer.

Q. Well, you state here, for instance, about the Japanese:

> "The dangerous and potentially dangerous aliens and citizens have been arrested and interned by the Army. The remainder have proved on innumerable occasions that they are loyal to America."

A. Well, of course, that's a statement, Mr. Anthony, of very general character. When you are writing an article such as that, it is impossible to go into all the details and say that so many thousands are loyal, so many thousands are suspected of being potentially disloyal, etc. I brought out in my direct testimony the opinion that I hold of the loyal Japanese, but I also reiterate that in this community I am positive that there are many potentially disloyal Japanese.

Q. Simply because of their racial ancestry? [690]

A. No; that is one factor; but for the reason that we are constantly picking them up day after day and bringing them before our hearing board, and they admit that they wish Japan to win the war. We have never had a Japanese come up and tell on another Japanese that he is disloyal. They will come and testify as to their character or their activity, but they will never impugn the loyalty of one of their own. And that does not happen with the Germans nor does it happen with the Italians.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

our other enemies. Therefore, we have a right to be suspicious; and I, charged with security, it is my duty to exercise a super-abundance of caution.

Q. Getting back to why we can't try these offenses either under a Federal statute or Territorial statute, I believe you said the trouble in Federal Court was that there were political influences such as existed on the east coast of the United States.

A. I said influences, political or otherwise. I think that——

Q. Are you fearful of that in this area?

A. Always. I am fearful always of political influences because that is what life is. Our whole life is political. There is hardly a problem that comes up to be solved in this community that there are not pressure groups of all sorts; they come into my office every day.

Q. General, is there any reason, any fact that exists [691] down here that wouldn't make all of these things, as you say, fully applicable as to what ought to be done in California or Maryland or Pennsylvania?

A. I don't think I quite understand the question.

Q. As I understand you, the Military Commander must be able to have his orders carried out, and he can't be bothered with any other agency except something that he can order to do?

A. "Bother" is hardly the word to use, because that implies a disregard, a lack of respect on the

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

part of the Military Commander. That is not true.

Q. Well, I didn't mean to imply anything.

A. Well, it was the word that you used.

Q. Well, you shouldn't brook any interfernce?

A. No, it isn't as strong as brooking any interference. It is adherence to the principle, Mr. Anthony, that where you charge a man with responsibility, you must give him the authority to exercise that responsibility. And if you refer to civil courts offenses which have been characterized as offenses by the Military Commander, you are placing, therefore, in the hands of another agent the enforcement of your regulations. And if he doesn't choose to enforce them the way you feel they should be enforced, your authority, therefore, is diminished and in time even nullified.

Q. Then you think the Western Defense Command was injured by that program in California? Is that the result [692] of that?

A. I don't care to express an opinion on that. I am dealing with the local situation.

Q. But you are dealing with it in such a general phase, General Richardson, it seems fully applicable to any other East or Southern Command, then, is that not a fact?

A. Yes, I do think this, that this Commanding General of the Eastern Defense Command was placed in a very embarrassing position by the ruling of the court in returning to the jurisdiction of the First Corps Area the citizen who was ejected,

or alien—I don't know whether it was a citizen or an alien.

Mr. Anthony: May we have a 5-minute recess, your Honor?

The Court: Yes. We will have a recess.

(A recess was taken at 10:27 a.m.)

After Recess

Cross-Examination

(continued at 10:40 a.m.)

By Mr. Anthony:

Q. General, is it your military judgment that the present blackout is necessary for the defense of these islands?

A. You mean in its modified form?

Q. The existing blackout regulations.

A. Yes.

Q. Do you know what the practice is in the Gilbert and the Marshalls and Guadalcanal in regard to blacktout? A. Yes. [693]

Q. Could you tell us that without divulging any secrecies?

A. Perhaps I answered a little too categorically. I could not state with certainty what the conditions are, but generally speaking there is no blackout.

Q. And the blackout that exists here exists in places other than military and naval installations, is that not a fact? A. Here?

Q. Here in Oahu?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. Yes, the entire city is blacked out after 10 o'clock.

Q. The waterfront? A. No.

Q. Pearl Harbor?

A. No. They are allowed to have their lights because they have to work. It is in the prosecution of the war.

Q. Now, when the fleet pushes farther west, as we are now informed they are doing in Palau, as I understand you the imminent danger of invasion of Hawaii increases? That is your testimony?

A. No, I did not say that. I said that I would not argue the question of the imminent danger of invasion. I say that the danger of an attack on Hawaii is always imminent and impending, and that danger increases wher the fleet is here in port. It is much greater when the fleet is in port than when it isn't.

Q. Well, when the fleet is in port, are the restrictions [694] on the blackout and other regulations of civilians increased any?

A. I don't think I should answer that question, Mr. Anthony. I don't think it would do any good to answer that question.

Q. Well, if that is your judgment, we'll accept, the Court will accept that, I think. You prefer not to answer that question?

A. I would prefer not to answer that question. I might modify that by saying——

Q. I don't want anything that you feel, as Mili-

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

tary Commander in this area, you shouldn't say.

A. We have to be alert.

Q. General, are you familiar with the Biennial Report of the Chief of Staff of the U. S. Army, covering the period of July 1, 1941, to June 30, 1943?

A. I know that the book exists and I have read it, parts of it. I could not say that I was thoroughly familiar with it.

Q. General Marshal tells us in this book that the war is in, as he describes it, five phases. Are you familiar with that part at all?

A. No, but if you will refresh my memory——

Q. Well, I will refresh your memory. The first phase he treats, General Marshal says—and this is in his report [695] to the Secretary of War:

> "In my first report, which covered the period July 1, 1939, to June 30, 1941, events were treated in two phases. The first phase included the fall of France."

Then he goes on to say:

> "The second phase commencing with the Battle of Britain and terminating with the German declaration of war against Russia."

Then he goes to what he calls the third phase, which brought to an abrupt conclusion the Japanese attack of December 7, 1941. The fourth phase, the complete mobilization of the power of the United States, and the fifth phase, which he says we are in now, and this is what he says:

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

"The fifth phase in which we are now engaged involves the launching of Allied military power against our enemies in a series of constantly increasing offensive blows until they are beaten into complete submission."

You agree with that analysis of the stage of warfare that we are in at the present time?

A. Yes, we are engaged now in attacking our enemies.

Q. General Marshal also says:

"Immediately after Dunkirk the British Isles were in effect defenseless insofar as any organized and equipped ground forces were concerned. Practically all their field Army and equipment had been lost, and an immediate invasion was threatened."

Would you say General Marshal uses that expression accurately in that connection, the situation of the British after Dunkirk?

A. It would be impossible for me to state just what General Marshal had in mind when he made that statement. [696]

Q. Well, presumably he is a soldier like yourself and used to precise military terms, is he not?

A. He is speaking very broadly.

Q. Would it be of any significance to you, as an expert military commander, to know that no place in either the Army's or Navy's description of December 7th attack that incident is referred to as anything other than an attack or an assault?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. I haven't analyzed the reports to that extent.

Q. Well, have you ever seen a military report which has treated the raid of December 7, 1941, other than as an assault or a raid, as distinguished from an invasion?

A. It must have been in the mind of Governor Poindexter that it was an invasion when he invoked the provisions of the Hawaiian Organic Act and came down to General Short and turned over to him the powers of the Government.

Q. Well, at that time we were hearing rumors that parachute troops were landing in Manoa Valley, General, Maybe that's what the Governor had in mind.

A. I have no idea what he had in mind.

Q. Have you examined the proclamation of General Short and Emmons? A. I have.

Q. It's a fact that they referred to that opening of the war as an attempted invasion, isn't that so?

A. There is nothing that I know of in the law that specifies the degree of the invasion or the degree of imminence. [697]

Q. I am just asking you about the fact now. We will talk to the Court about the law. That is a fact, they called it an attempted invasion, both Generals?

A. I would have to refresh my memory.

Q. Well, we have it right here, General.

A. If they said it, it is there; that's all there is to it.

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Q. This is a very bad copy, General. (Handing the witness a file of papers). That's a proclamation of General Short of December 7, 1941. If you can examine that paragraph that I have indicated here—in that proclamation, General Short refers to the many means of attack by the enemy and a possibility of invasion. Do you think that he was using that expression inaccurately at that time?

A. No, I do not think so.

Q. And that was an accurate description of what was taking place out here on December 7th?

A. If that was General Short's idea, I presume it was accurate.

Q. It was reaffirmed by General Emmons when he took over this command.

A. I am in no position to pass judgment on their judgment at that time, but I presume that it was accurate.

Q. They had complete knowledge of the facts, presumably? A. Presumably.

Q. Being here. At the present time we have definite [698] air superiority in the Central Pacific area, do we not?

A. I believe that we have.

Q. And is this report of General Marshal accurate in referring to this theatre: (Showing witness a book).

"Air superiority was demonstrated by a loss ratio of four to one in our favor."

A. If General Marshal stated that, I am sure

(Testimony of Lt. Gen. Robert C. Richardson, Jr.) that it was based upon accurate intelligence and information.

Q. Are you able to give us any closer appraisal as to what the air superiority is at the present time? This was dated June 30, 1943.

A. I am not.

Q. Have we increased our air superiority over the Japanese since June 30, 1943?

A. Yes. But you must remember that that isn't referring to the whole Pacific area, unless I am mistaken.

Q. Well, I'll read the paragraph, if you'd like to hear it:

"The United Nations in the Pacific Theatre—" Now, what does the General mean?

A. He refers to everything, including General MacArthur's area.

Q. That's what I thought.

> "—now possess more secure positions from which to counter Japanese offensive ventures. Also, Commanders and troops had secured valuable experience in battle. Unified command arrangements have welded sea, air and ground forces into efficient fighting teams. Air superiority was demonstrated by a loss ratio of four to one in our favor. And a more complete [699] control of the sea made possible by the skip bombing tactics perfected in the southwest Pacific by General Kenney's airmen."

General Marshal is talking about the entire theatre, is he not, the entire Pacific theatre?

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

A. It would seem so.

Q. General Richardson, getting back to our system of provost courts, is it fair to say that the reason that you do not desire to have military regulations enforceable either in this Court or in Territorial courts is that you do not have confidence in the judges who would administer the regulations?

A. Oh, by no means, by no stretch of the imagination. I would like to make that just as emphatic as possible. My whole position in this matter is that, having responsibility, I must have the authority to enforce my orders. And, inasmuch as the laws of the territory and the laws of the Federal Government do not characterize as offenses the offenses which in this Territory are considered essential to security, and the violation of which must be punished quickly, then we must have some means, some military tribunal at my disposal to handle those cases in order to enforce my authority. And, as I repeated, and I state again, that if it were possible for me to transfer, to eliminate the provost courts and return that authority to the civil courts, I would be the first to advocate it. I have studied that problem for the last three months. When I first approached it, I thought that I would be able to do it. But after many conferences on the subject, I came [700] to the conclusion that I would be weakening my authority. I am faced here with a reality. I am not faced here with academic questions. And if I sense the feeling of this community correctly, en-

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

forced by the sentiment and feeling of our Nation as a whole, we are in no mood to have another Pearl Harbor.

Q. What do Military Courts have to do with military disaster, General Richardson?

A. It has a great deal to do with its repetition, because it allows the Commander to so enforce his orders as to instill into the offenders a fear of violation thereof.

Q. Well, the raid on Pearl Harbor had nothing to do with the civil population, did it, General Richardson?

A. Not at that particular time. Remember, we were not at war when the raid occurred.

Q. No, but I am just trying to find out how you relate those two things.

A. Let me try and explain it again. I can understand that it is very difficult for a layman to appreciate what responsibility in this area means. But I know that we have here thousands and thousands of American boys in the services who have given up a lot of their civil liberties, too. I have renounced a great many of my civil liberties in donning the uniform. And you must remember that in this area all of these young men, officers and men, and women, too, who are serving in the Armed Forces, they willingly gave up those because down in their hearts they know it is right. Now, it may be against [701] academic questions for a military commander to have a tribunal in a civil community such as this, which is a part of our Territory, to en-

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

force his orders. But we are in a very special position here on the Islands of Hawaii. As I have stated, we are in the combat zone; we are in an active theatre of war; we haven't got a homogenous population, we have a heterogenous population with all sorts of affinities and loyalties which are alien in many cases to the philosophy of life of the American Government. And these boys out here in the defense area are entitled to security. Our fleet is entitled to security, without any academic questions entering it at all.

We are faced with reality, and, as the motto of the D.A.R. is, "Eternal Vigilance Is The Price Of Liberty."

I cannot, as a soldier, renounce my duty or what my conscience dictates in order to carry out the mission of the Commander-in-Chief, Admiral Nimitz. And I know this, too, that the people on the mainland feel the same way, that this place shall be secure. And they would never forgive any letdown in regulations or measures to insure their security. And they are out here in this area, these soldiers, and they, too, as I say, have renounced their liberties and they are suffering a great many spiritual wounds, separated as they are from their families, as well as flesh wounds.

And I feel that you are trying to weaken my authority here, that you are trying to take away from me the measures that will insure the security of these islands by the elimination [702] of these provost courts and the abolition of this partial and

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

very mild form of martial law which in no way interferes with the activity of this community.

Q. All I am trying to do, General Richardson, is to give this boy here the kind of a trial that the Constitution and laws of the United States say he is entitled to; that is all I am trying to do.

A. He has gotten as fair a trial as thousands of soldiers in the Armed Service who appeared before the summary courts, the one-man court. He committed a military offense. He didn't commit a civil offense. And therefore he goes before a military tribunal.

Q. You make no distinction between your Governmental or political mission and the military mission? It is all one, so far as you are concerned?

A. My mission is not political. My mission——

Q. I mean political in the highest sense, Governmental.

A. Well, if you want to put it in the intellectual sense, there is a certain affinity.

Q. Yes. You make no distinction?

A. No.

Mr. Anthony: I think that is all.

Redirect Examination

By Mr. Ennis:

Q. General Richardson, Franklin D. Roosevelt, in his [703] Alien Enemy Proclamation of December 8th, giving authority to deal with aliens of Japanese ancestry, stated:

"As President of the United States, and as

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

Commander-in-Chief of the Army and Navy of the United States, I do hereby make public proclamation to all whom it may concern, that invasion has been perpetrated upon the territory of the United States by the Empire of Japan."

From the military point of view, do you agree with that statement? A. Yes, I do.

Q. General Richardson, you referred to certain litigation on the east coast of the United States. Do you know whether that area was an active theatre of war?

A. At that time it was classified as a theatre of operations.

Q. Not an active theatre of war? A. No.

Q. Of course, the population——

A. It was a potential theatre of war.

Q. It does not contain the Japanese population that you have here. Now, General Richardson, based upon your study of the matter, and having in mind your military responsibility for the military security of this Territory, is it your opinion that the public safety requires the modified form of martial rule which exists here, and in particular provost courts for the military offenses which were declared in your General Orders, and in particular again the offense of an attack on a sentry, [704] which is here involved?

A. Ever since my incumbency as Military Governor, I have given the most careful study to the

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

possibility of eliminating this modified form of martial law and the provost courts. I did that for a number of reasons. First, I wanted to carry out, if I could, the directive of the President, which expressed the thought and idea when he approved the proclamation that gradually there would be a return to civilian control of the civilian functions. Secondly, I wanted to do it, if I could, for the reason that I have many other duties besides looking after some of the civilian population. And also because fundamentally I believe that it is right, that it should be, if possible, in the hands of the civilians.

I am an American. I think I understand American tradition, American law. And I would be the first to get up and say, the time has now come to renounce this form of modified martial law, if I conscientiously could do it. But I do not feel that I can conscientiously do it and carry out my mission, which has been assigned to me for the security of these islands. I feel that I must have that control that is necessary to insure the safety and security of Hawaii, which involves the safety and security of the fleet, upon which the fate of this Nation depends.

Q. One last point I'd like to clear up, General. Despite the increase in the United States fleet, and any increased protection we may have here against an attack by the Japanese, [705] is it your testimony that carrier-borne Japanese planes could get

(Testimony of Lt. Gen. Robert C. Richardson, Jr.)

over these islands despite all protective measures we might take?

A. Absolutely. We have taken the utmost precautions for their detection, but they are not infallible and they have very definite limitations. Witness, for example, the marvelous protection that Germany has. Yet, despite that, the English and the Americans penetrate into German territory, and vice versa, the Germans into England. It seems to me, if I may add, that the primary consideration in viewing any of these matters is the prosecution of the war without interruption to a successful termination. And that every act of the Military Commander should be viewed whether it forwards that objects or is hindering its accomplishment. I say, and give it as my judgment, that if we remove from the authority of the Military Commander the power which is given to him under this modified form of martial law, we hinder the successful accomplishment of the war.

Mr. Ennis: That's all of redirect. Any further recross?

Mr. Anthony: No. That is all.

Mr. Ennis: Thank you.

(Witness excused.)

Mr. Ennis: Admiral Nimitz, will you take the witness stand, please? [706]

ADMIRAL CHESTER W. NIMITZ, U. S. Navy, a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Ennis:

Q. Admiral Nimitz, will you state your full name and your present official position?

A. Chester W. Nimitz, Commander-in-Chief Pacific fleet and Pacific Ocean areas.

Q. Now, Admiral Nimitz, your affidavit annexed to the return and answer in this case, sworn to on March 24, 1944—I will just state this to shorten up the qualifications—states that you were graduated in the Naval Academy in 1905 and have been in the U. S. Navy since, occupying different positions both at sea and in the Navy Department.

A. That is correct.

Mr. Ennis: Do you admit the qualifications as they appear in the affidavit?

Mr. Anthony: Yes, we admit that.

Mr. Ennis: We'll admit that, then. Admiral, will you state in a general way, then, what your duties as Commander-in-Chief of the Pacific area are?

A. To prosecute the war in the Pacific Ocean areas in accordance with general directives from the Joint Chiefs of Staff. [707]

Q. And in the discharge of those duties, have you made yourself familiar with enemy actions in the central Pacific area?

A. To the best of my ability, yes.

(Testimony of Admiral Chester W. Nimitz.)

Q. Will you state, Admiral Nimitz, in a general way the strategic position of this Territory as part of your general command?

A. The Hawaiian area constitutes the only base for the Navy that we have in the Pacific Ocean at the present time. It has the greatest importance to the fleet and to the Army for operations to the westward. Anything that is injurious to this area is prejudicial to our conduct of the war.

Q. Do you believe, Admiral Nimitz, as a military matter or as a naval matter, that the Japanese enemy might or could attack these islands?

A. Yes, they could. It is still within their capability to make carrier attacks behind the front, in spite of the daily searches that we make. We have never ceased, since December 7th, to search the areas from which we think those attacks are likely to come. Until the last Japanese carrier is destroyed, that capability will exist.

Q. Admiral Nimitz, will you turn and examine the map which is on the easel here in Court. Was this map of the Pacific Ocean prepared in your headquarters? A. Yes, it was.

Q. Will you state from the map and from the legend which [708] you hold in your hand, which describes the meaning of the red and blue circles around the islands, the method in which an attack by the Japanese forces might occur?

A. First of all, I will describe the area which it is possible for us to cover by search; from areas which we control, this line here. (Indicating on map.)

(Testimony of Admiral Chester W. Nimitz.)

Q. The outer blue line?

A. The outer blue line gives the area which we can cover by aircraft search from bases in the continent of the United States and in the Aleutians. This inner blue line around the Hawaiian chain that goes up as far as Midway is the area in which it is possible for us to cover by search from bases in the Hawaiian chain.

Q. That is air search?

A. Air search. This wide red line here represents the area or the line of position from which Japanese aircraft can launch an attack on objectives. This one here on Midway, this one, French Frigate Shoals, and from here on the Hawaiian area——

Q. That's the red line around all of the Hawaiian Islands?

A. The red line around all of the Hawaiian Islands. These small circles around Midway, around French Frigate Shoals, and around the chain from Kauai to Hawaii represent the line from which submarines can launch planes to attack or reconnoiter the Hawaiian Islands. These lines here with arrows indicate [709] the directions from which carrier attacks may approach the islands.

Q. And those lines run between to some extent the areas of search by plane?

A. Yes. If the Japanese wish to recover their aircraft, they must come within this inner red line here. If they are willing to make an all-out attack

(Testimony of Admiral Chester W. Nimitz.)

and not attempt to recover their aircraft, they can attack from the line out here.

Q. That faint outer red line? A. Yes.

Q. And this map and this legend were prepared at your headquarters?

A. Prepared in my headquarters.

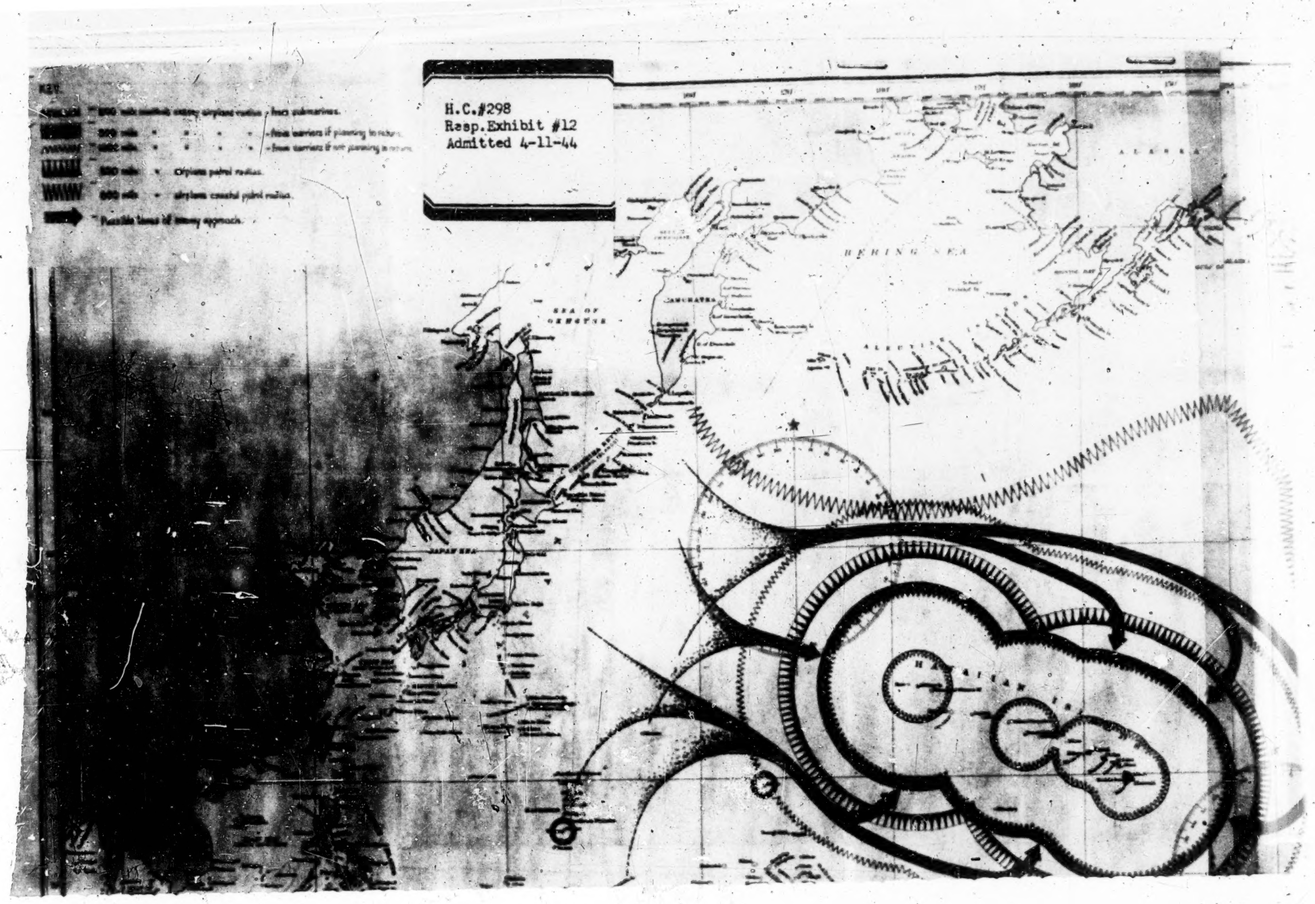
Mr. Ennis: I offer the map and the legend explaining the circles in evidence. Any objection?

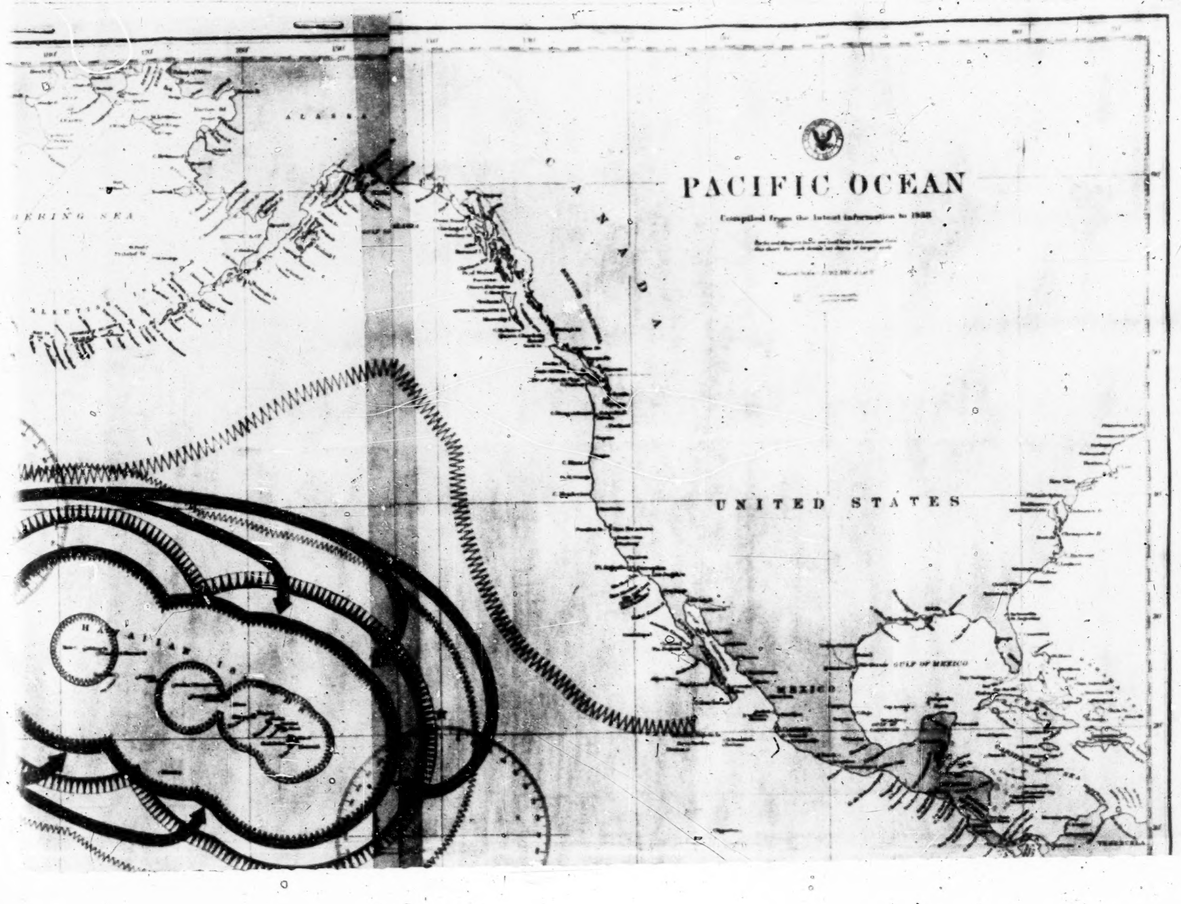
Mr. Anthony: No objection.

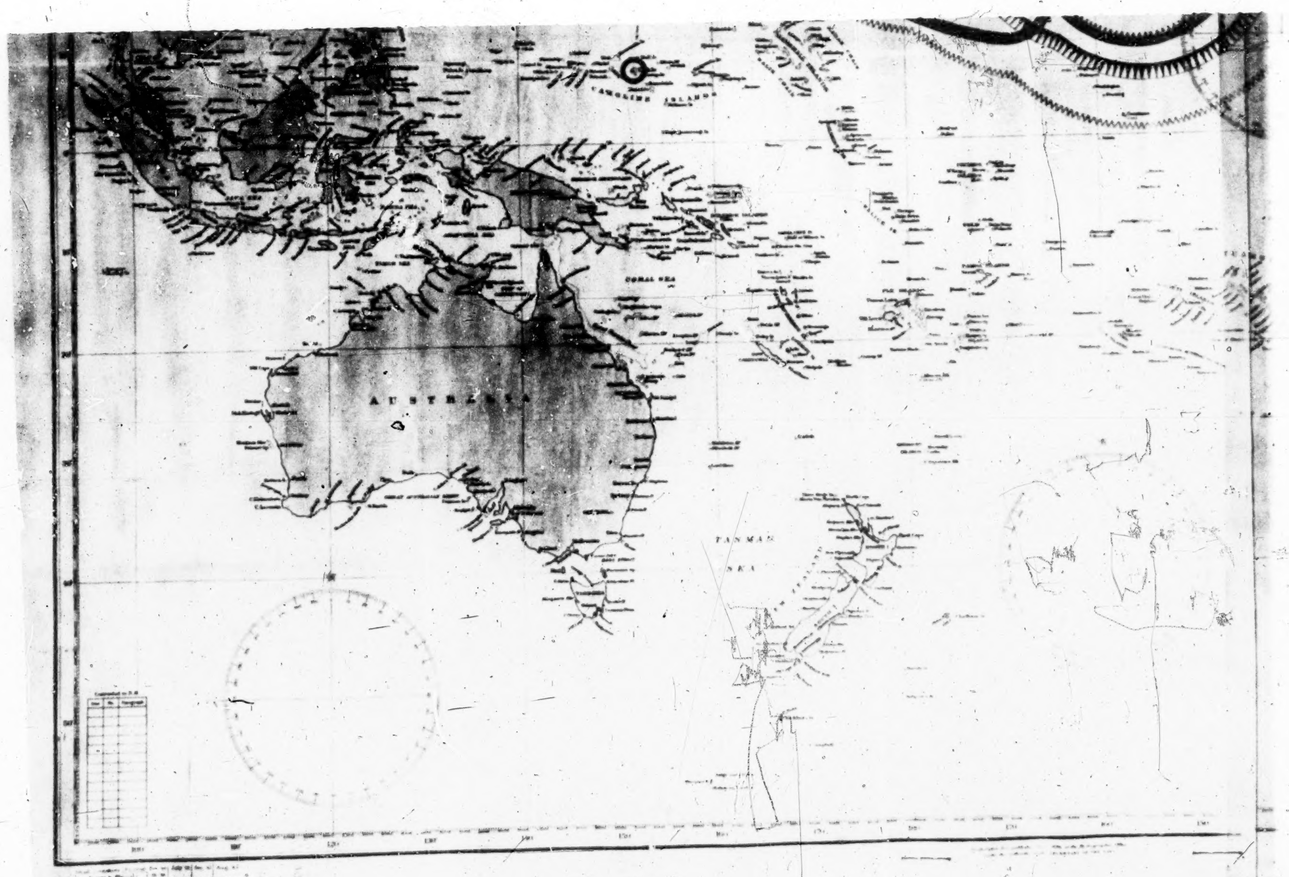
The Court: Received in evidence as Exhibit 12.

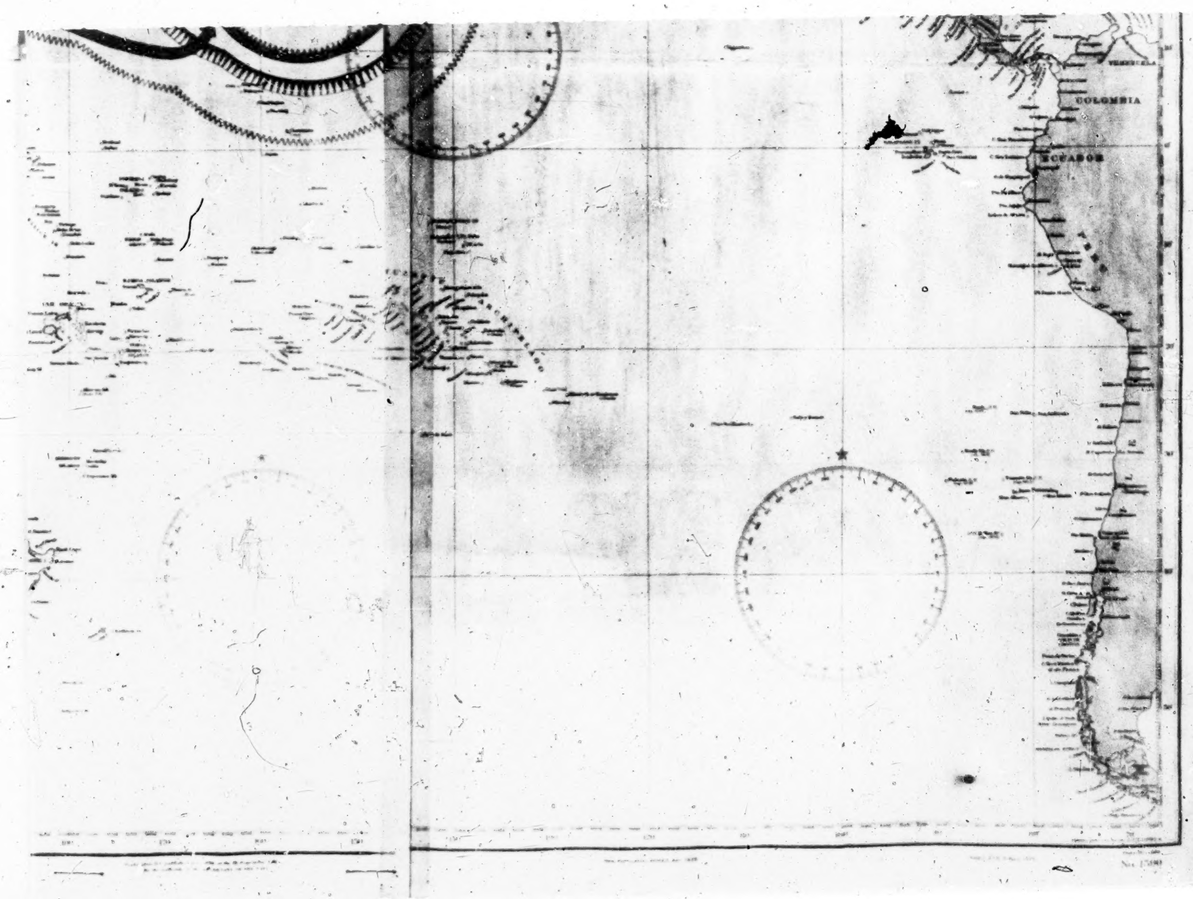
(Respondent's Exhibit 12 was received in evidence.)

H.C.#298
Resp.Exhibit #12
Admitted 4-11-44









(Testimony of Admiral Chester W. Nimitz.)

By Mr. Ennis:

Q. Admiral Nimitz, in addition to the possibility of an attack by carrier-based planes, are there other military factors, major factors to be considered in determining the possibility of an attack by the Japanese on this Territory?

A. Yes. The Japanese can land commando raiders, espionage parties, in spite of any reasonable preventive efforts that we make. And the information that they might [710] possibly obtain would be in, my opinion, could be more injurious to our cause than if they came to these islands and established a beachhead on one of them. The information that they might obtain as to prospective movements of our fleet, the presence of our fleet in these waters, or its absence, the deductions that might be made from the information they pick up mingling with the Japanese of the community might very well cause some of our operations in the far west, far westward of here, to be unsuccessful.

Q. Well, in other words, do you agree with General Richardson's testimony that protection of these Naval operations to the westward from premature disclosure is a vital factor in your operations?

A. It is of the utmost importance, and the security against espionage activity in these islands is of the utmost importance.

Q. Admiral Nimitz, having in mind your duties here and your responsibility, and from your study of the situation, would you state whether or not,

(Testimony of Admiral Chester W. Nimitz.)

in your opinion, there is imminent danger of invasion of the Territory of Hawaii by the Japanese?

A. Invasion by sea-borne troops in sufficient numbers to seize a bridgehead, no. I consider it neither imminent nor probable. But invasion by stealth, by submarine, commando raids, espionage parties, I consider it not only probable but imminent. It is constantly impending. [711]

Q. And what is your view on invasion by carrier-borne aircraft?

A. I cited that in a previous answer, that it is possible, if the Japanese wish to take the risk; they have sufficient carriers and sufficient planes to make an attack on these islands similar to the one that they made on December 7th.

Mr. Ennis: You may cross examine.

Mr. Anthony: No questions.

Mr. Ennis: That is all, Admiral Nimitz.

(Witness excused.)

Mr. Ennis: May I have a recess to confer with Counsel, your Honor?

The Court: Yes. We will take a recess.

(A recess was taken at 11:17 a.m.) [712]

After Recess
(11:40 a.m.)

Mr. Anthony: Your Honor, I'd like to call Mr. Murakami, one of the witnesses for the Respondent, for further cross-examination. Is Mr. Murakami in the Courtroom?

ROBERT K. MURAKAMI

a witness in behalf of the Respondent, having previously been sworn, resumed and testified as follows:

Cross-Examination

By Mr. Anthony:

Q. You have already been sworn, have you not?

A. Yes, I have.

Q. Will you state briefly to the Court the difficulties involved in the expatriation of dual citizens of Japanese ancestry?

A. The difficulty is in the fact that a great many of the persons of Japanese ancestry born in the Territory of Hawaii were not registered with the Board of Health and consequently could not get their birth certificates, or they did not have the Hawaiian birth certificates already obtained to prove their American citizenship in order to take the steps to expatriate. So that was one of the obstacles or one of the difficulties which first had to be overcome. And when they did not have these certificates, those of us who were helping them had to let them get the birth certificates first and then, of course, the next step was to get what is called the copy of the family record in Japan.

(Testimony of Robert K. Murakami.)

Q. Where would they get that from? [713]

A. That would have to be gotten from the village office in Japan from which the parents of the individual came from.

Q. When, after you got that back from Japan, what would be done with that record?

A. That record, together with the report of expatriation, and also together with the copy of the birth certificate, would have to filed with the Japanese Consul.

Q. You are talking about cases in which the person is not even registered with the Consul, is that right, prior to 1924?

A. Well, in the case where the person was not registered with the Japanese Consulate, there is the additional or there is another step prior to that. That is to say, the report of the birth of the child had to be made through the Japanese Consulate first. And then——

Q. Even though the child's name was not on the Consul books, is that right? A. That is true.

Q. Then what would happen?

A. Then we would take the steps to file a report of expatriation, together with a copy of the family record and birth certificate.

Q. Were there any individuals that had no mother or father or no grandfather or grandmother? A. There were.

Q. How would they get some kind of a document to file with the Consulate? [714]

A. In such event the child had to be—a report

(Testimony of Robert K. Murakami.)

of the child establishing a home would have to be made in Japan through the Japanese Consul here. In other words, the child would establish a new home or a new family.

Q. In other words, he'd have to build himself into a new family tree, is that right?

A. That is true.

Q. And once he did that he'd get a record of that new family tree, bring that back here to file with the Consul, is that right?

A. Yes, a copy of that family record.

Q. That would get him on the books of the Consul? A. Yes.

Q. Then, from there on, you'd start your expatriation? A. That is true.

Q. How long would that take?

A. Of course, in that extreme case that you last referred to it might take six months or a year.

Q. Was there any resistance on the part of the Japanese of this Territory to going through the process of expatriation?

A. Yes, to some extent.

Q. What was the basis of their objection to expatriation?

A. The biggest objection they had was an argument along this line: Well, I don't want to take any step which would be construed as a recognition of any Japanese claim on me; and by expatriating or taking steps to expatriate, I would be admitting [715] that the Japanese Government has some claim on me. And I don't want to do that.

(Testimony of Robert K. Murakami.)

Mr. Anthony: That's all.

Mr. Ennis: No further examination.

(Witness excused.)

Mr. Anthony: Is Doctor Sakamaki in the Courtroom?

SHUNZO SAKAMAKI,

a witness in behalf of the Petitioner, being duly sworn, testified as follows:

Direct-Examination

Mr. Anthony: If the Court please, I would like to have considered in evidence this book which I have before me, for your Honor, entitled "A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties," edited by Richard W. Flournoy, Jr., Assistant Solicitor, Department of State, and Manley O. Hudson, Bemis Professor of International Law, Harvard Law School; Oxford University Press, 1929. I might state for the Court's benefit that Manley O. Hudson, for at least 20 years to my knowledge, has been a professor of the Harvard Law School in the Chair of International Law. There is a chapter in here that relates to Japanese expatriation and dual citizenship. The book is not mine but I would like to have it considered in evidence if the Court will so rule. Counsel has no objection to it.

Mr. Ennis: That is correct.

(Testimony of Shunzo Sakamaki.)

Mr. Anthony: I will make it available to the Court. [716]

The Court: What is it you want to point out other than that mentioned that is contained in the book?

Mr. Anthony: Well, the problems that are involved in expatriation.

The Court: Only relating to Japanese?

Mr. Anthony: Well, if the Court is interested, the same problem applies to the Germans and Italians, French; indeed, the same problem exists in all countries that follow the civil law as distinguished from our law.

The Court: At what page is it?

Mr. Anthony: I will call those particular pages to your Honor's attention at a later time, unless you care to have me do it now.

The Court: I'm not awfully interested in the whole topic there.

Mr. Anthony: Well, I didn't think it had any relevance, your Honor, but the other side has seen fit to introduce evidence along that line, and I wanted to complete the record.

The Court: Well, that's all right. It may be received in evidence.

The Clerk: Petitioner's Exhibit "O".

The Clerk: Exhibit "O".

Petitioner's Exhibit "O" was received in evidence)

(Testimony of Shunzo Sakamaki.)

The Court: What do you call the book?

Mr. Anthony: Nationality laws. [717]

By Mr. Anthony:

Q. Will you give your name to the reporter?

A. S h u n z o S a k a m a k i, S-h-u-n-z-o S-a-k-a-m-a-k-i.

Q. Dr. Sakamaki, what is your present employment?

A. I'm an Assistant Professor of History at the University of Hawaii.

Q. Were you born in the Territory of Hawaii?

A. Yes, sir.

Q. Where were you educated?

A. I was educated in the public schools of Hawaii, and I got my Bachelor's degree and my Master's degree from the University of Hawaii, and my Ph. D. from Columbia University in New York.

Q. What do you do as to the Doctor's degree?

A. My Doctor's work was in history.

Q. How long have you been a professor at the University, assistant professor at the University?

A. At the University of Hawaii since February, 1936.

Q. And you are at the present time?

A. Yes, sir.

Q. Do you know whether or not you are or were a dual citizen, Doctor?

A. I was a dual citizen, because any person born before December 1, 1924, automatically was a dual citizen in that Japan claimed him as a Japanese subject; whereas the U. S. Government

(Testimony of Shunzo Sakamaki.)

also claimed him as a citizen because he was born here. And I was in that status until 1925 when I was expatriated from Japan. [718]

Q. You went through the necessary red tape to get off the books, is that right?

A. Yes, sir.

Q. Doctor, prior to the war were you a member of the committee that had anything to do with the expatriation of Japanese of this Territory?

A. I was a member of a committee that sponsored a campaign in November, 1940, to secure signatures to a petition that we addressed to the Secretary of State, Cordell Hull, asking him to use his good offices to negotiate with the Japanese Government for a simpler procedure of expatriation from Japanese nationality.

Q. It is a fact, is it not, that that procedure was at times very complicated?

A. It is extremely cumbersome, sir.

Q. Was there any objection to the going through with the formality of expatriation such as Mr. Murakami has referred to?

A. Yes, a considerable number of young people felt that they were American citizens because they were born here and were legally American citizens, and they did not wish to acknowledge any claim of any foreign government upon them, and applying to that foreign government for expatriation seemed to them to be an acknowledgment of the claim of that government upon them, and they did not wish to admit any such claim.

(Testimony of Shunzo Sakamaki.)

Q. Some of them resented it, did they not?

A. Oh, yes, very strongly.

Q. Will you tell the Court what your committee did and [719] how many names you got to this petition to the Secretary of State?

A. Your Honor, we had a campaign in November, 1940, to secure signatures of American citizens of Japanese ancestry of 16 years of age and over. We started a campaign on November 7th and ended it on November 30th. And we got approximately 30,500 signatures to that petition.

Q. I hand you two sheets of paper and ask you if this is the petition to which you refer, a copy of the petition? (Handing witness two sheets of paper.) A. That is sir.

Mr. Anthony: We offer the copy of the petition in evidence, if the Court please.

Mr. Ennis: No objection.

The Court: Received as Exhibit "P".

(Petitioner's Exhibit "P" was received in evidence.)

PETITIONER'S EXHIBIT P

(Copy of Petition)

November 30, 1940.

Honorable Cordell Hull,
Secretary of State,
Washington, D. C.

Dear Mr. Secretary:

We, the undersigned, are American citizens of

(Testimony of Shunzo Sakamaki.)

Japanese ancestry, born under the United States flag. By virtue of our birth on American soil we are American citizens, according to the laws of these United States. At the same time, according to the citizenship laws of Japan, we were born Japanese citizens because our parents were subjects of Japan. We were thus born with a dual citizenship status, owing to the operation of two types of citizenship laws.

We have grown up as Americans in mind and spirit with loyal devotion in our hearts to this land of our birth. Many of us, indeed, were unaware that we were claimed as citizens by another government, being in this respect like other Americans who, quite unknown to many of them, are likewise claimed by the nation of their foreign-born parents.

By action of the Government of Japan in 1924, a procedure of expatriation from Japanese citizenship has been provided, and a substantial number have been duly expatriated. We wish to call to your attention, however, that the expatriation procedure is complicated and cumbersome, entailing involved correspondence and long waiting. In many individual cases the technical difficulties are appalling, and in numerous instances more than a year elapses before the action is at long last completed. Some of the older members of our group have found it well-nigh impossible to secure the witnesses required for the issuance or validation of birth certificates, without which expatriation applications

(Testimony of Shunzo Sakamaki.)

cannot be filed, so that no matter how much they may desire to be expatriated from the Japanese nationality they cannot realize their wish. Many have been deterred from taking the necessary steps for expatriation because of the cumbersomeness and sheer difficulty of the procedure, or because they are unwilling to recognize a claim upon them by any government other than that of the United States.

As a result, an appreciable number of Americans of Japanese ancestry are still left in the undesirable status of dual citizens. This is a situation of personal distress and inconvenience to the individuals concerned, resulting in tension and misunderstanding and bringing upon the heads of us Americans of Japanese ancestry much undeserved and unwarranted suspicion on the part of some of our fellow citizens.

We realize just as clearly as any of our fellow Americans that it is of the utmost importance that the nation be united in loyal thought and action, particularly in times of emergency or crisis; and we regard ourselves as the equal of any of our fellow Americans in the sincerity and intensity of our allegiance to this land of our birth and the Stars and Stripes that symbolize our great nation.

Therefore, we respectfully address this petition to you, requesting that you exercise your good offices to the end that an arrangement be reached with the Government of Japan which will provide

(Testimony of Shunzo Sakamaki.)

a more simple procedure of expatriation from the Japanese nationality.

Respectfully yours,

Petition To The Secretary Of State
United States Of America

Signature Address

.....

.....

[Endorsed]: Filed 4-11-44.

By Mr. Anthony:

Q. After you completed your petition, what did you do with it, Doctor?

A. We had it bound and mailed to our delegate to Congress, Mr. King, who presented it to the Secretary of the Interior, Mr. Ickes, and Mr. Ickes presented it to the State Department.

Q. And that got to the State Department some time around November of 1941, did it not?

A. That's right.

Q. And that's the last you ever heard of it?

A. That's right, sir.

Q. Doctor, I hand you a mimeographed letter which is signed [720] by The Campaign Central Committee, and ask you if you recognize that? (Handing witness several sheets of papar)

A. I do, sir.

Q. Did your committee prepare that letter?

A. Yes, sir.

(Testimony of Shunzo Sakamaki.)

Q. And to whom was that letter sent?

A. It was sent to persons who helped us in the campaign, either financially or in soliciting of signatures.

Q. It was a short report on the doings of your committee, is that not right? A. Yes.

Q. I also hand you a mimeographed sheet of the treasurer's report. What is that report, the treasurer's report of the financial activity of this committee? (Handing witness several sheets of paper) A. Yes, sir.

Q. Was that mailed to all the members?

A. It was mailed to all.

Q. The supporters?

A. To all the supporters, yes, sir.

Mr. Anthony: We offer these two documents in evidence, if the Court please.

Mr. Ennis: No objection.

The Court: Received as Exhibit "Q".

(Petitioner's Exhibit "Q" was received in evidence.) [721]

PETITIONER'S EXHIBIT "Q"

TREASURER'S REPORT

DONATIONS RECEIVED FOR THE CAMPAIGN FUND

Hawaiian-Japanese Civic Association	$100.00
Tomoe Club	10.00
Japanese Central Institute Alumini Association	10.00
Niji-no-Kai	10.00
West Kauai Civic Association	25.00
T'Weeks Club	10.00
Nisei Kai	5.00

(Testimony of Shunzo Sakamaki.)

Torii Kai	5.00
Chikasaw Guild	25.00
Japanese Women's University Club	5.00
Waipahu YBA	10.00
Waipahu Shinyu Futaba Kai	5.00
United YBA of Kauai	10.00
Haleiwa YMA	5.00
Imua Club	10.00
Carps Club	5.00
Nenichi Kamuri, Ritz Clothiers	15.00
Wahiawa Japanese Civic Association	20.00
Edward N. Yamasaki, Melim Service & Supply Co.	5.00
Aiea Civic Club	10.00
Waialua Civic Association	20.00
Waialua YBA	5.00
Kawailoa Soto YBA	5.00
Haleiwa Meisho YBA	5.00
Mikkyo Seinen Kai	5.00
Japanese High School	10.00
University Japanese Club	10.00
Wakaba Kai	5.00
Shinyu Kai, YWCA	5.00
Ewa YMA	5.00
Hawaii Kyoiku Kai	25.00
Aiea YBA	5.00
Pearl City Civic Association	5.00
Roy Yuko Mijo	.25
Taro Makamine	.25
Sanji Abe, Hilo	10.00
Waianae YBA	5.00
Honouliuli Civic Association	5.00
Chippewa Club	5.00
Nansei Kai	5.00
Wahiawa YBA	5.00
Uruma Seinen Kai	5.00
Kahuku YBA	5.00
Jodoshu Fugoku Meisho Seinenkai	10.00
Shigeto Nakamura	1.00
Yeiso Yamaura	1.00
Junichi Teraoka	1.00
Kenzo Hamamoto	1.00
Fujito Higashi	1.00
Wallace Otsuka	1.00

(Testimony of Shunzo Sakamaki.)

Henry Y. Matsuki	1.00
Dr. N. Masunaga	1.00
Nobuo Fujitani	1.00
Nobuo Watamura	1.00
George Kamei	1.00
Masaru Shinseki	1.00
K. C. Yamasaki	2.00
Yutaka Ota	2.00
Charles S. Ishii	10.00
Y.W.B.A. of Hawaii	5.00
Order of Nahobi	10.00
Total received	$506.50

Donations received to date ..... $ 506.50

Disbursements

1. Administrative		
a. Postage	39.01	
b. Stationery	86.77	
c. Printing	51.50	
d. Office Help	83.33	
e. Telephone, radio, wireless	19.15	
f. Binding and forwarding petition	18.60	
2. Meeting arrangements		
a. Hall rental	12.00	
b. Refreshments	10.30	
3. Travel expenses		
a. Hawaii - Maui	43.90	
b. Molokai - Lanai	28.65	
c. Kauai	31.15	
d. Oahu, Rural	—	
e. Honolulu	—	
Total	$424.36	
Balance		$ 82.14

Respectfully submitted,
ARTHUR Y. AKINAKA,
Treasurer

(Testimony of Shunzo Sakamaki.)

June 17, 1941

Dear Friends:

Thanks to your cooperation and the help of many friends all over the Territory, our expatriation-petition campaign resulted in securing the amazing total of over 30,000 signatures. The petition has been duly accepted for consideration by Secretary of State Cordell Hull, to whom it was presented by Delegate Samuel Wilder King through Secretary of the Interior Harold L. Ickes.

Whether or not the State Department takes any action on our petition within the near future, one thing seems quite certain—that the text of the petition and the astounding total of signatures affixed thereto resulted in a distinct improvement of our position as Americans, in the estimation of our fellow-citizens. The warm endorsement of General Herron, Admiral Bloch, and others, as featured by the press definitely helped to reduce misunderstanding, suspicion, and fear. We trust, therefore, that you feel with us that the campaign was eminently worthwhile.

The list of those who helped to obtain signatures is very large, and we realize there are many others who helped whose names are not known to us. To every one who helped, we are most sincerely grateful, even if we may not reach all by a letter like this.

Appended herewith is a list of the donations which financed our campaign. To all the donors go our very grateful thanks. The total contributed

(Testimony of Shunzo Sakamaki.)

amounted to $506.50. Our expenses totalled $424.36. An itemized account of those expenses is available to anyone who desires it. A net balance of $82.14 was obtained.

A "hold-over committee," consisting of Miss Yuki Kimura, and Messrs. Shigeo Yoshida, Susumu Hashitate, Howard Kurio, and Uichi Kanayama, decided to buy with this surplus money 120 copies of "The American Citizens Handbook," a 366-page book published this year by the National Education Association of the United States, in Washington, D.C. The book retails for a dollar a copy (cheap at that price) but we obtained a 1/3 discount for ordering so many copies at once.

The 120 books have arrived from Washington, and before long we shall formally present them to the Territory of Hawaii as souvenirs of our memorable campaign and tokens of our desire to contribute to American education. We shall place a suitable inscription in each volume, and our plan is to have copies placed in all the public libraries and all the intermediate and senior high schools, and other such institutions throughout the islands. This will be a permanent and tangible contribution to the Territory from us all.

We expect to officially present the books to the Governor, or Acting Governor, asking him to accept our gift on behalf of the Territory. On that occasion, we hope that everyone who can be present will attend. —Please watch the newspapers for future details as to time and place.

(Testimony of Shunzo Sakamaki.)

Again, with thanks and Aloha, we beg to remain,

Yours very truly,

The Campaign Central Committee,

MASATOSHI KATAGIRI,
Chairman

SHUNZO SAKAMAKI,
Executive Secretary

ARTHUR Y. AKINAKA,
Treasurer

SHIGEO YOSHIDA

WILFRED C. TSUKIYAMA

KATSURO MIHO

[Endorsed]: Filed 4-11-44.

Q. Doctor, when you got through with your petition, did you have any money left over?

A. We had about $500 donated to meet the expenses of the campaign, and we had about $100 left over.

Q. What did you do with that?

A. A committee was appointed to look into the matter and it decided to purchase 120 copies, called "The American Citizen's Handbook," for distribution to various libraries in the Territory, all the high schools and intermediate schools' libraries and all the public libraries as a gift to the Territory.

Q. Is this a copy of that book? (Showing witness a book) A. That's right, sir.

(Testimony of Shunzo Sakamaki.)

Q. The rest of the fund was used in the purchase of these books? A. That's right.

Q. And they were presented to what?

A. They were presented to all the public libraries and all the high school and intermediate school libraries and the University of Hawaii library. The presentation was made to the Territory through Acting Governor Hite.

Mr. Anthony: No further questions.

Mr. Ennis: No Cross-examination.

Mr. Anthony: Thank you, Doctor.

(Witness excused)

Mr. Anthony: If the Court please, I'd like to offer in evidence a copy of General Orders No. 31, which through inadvertance [722] or otherwise was omitted from the orders which were attached to the return.

Mr. Ennis: If your Honor please, I don't see the relevancy of General Order 31 at this time. As Counsel and the Court knows the General Order was rescinded by General Order No. 38, and I object solely on the ground of relevency.

Mr. Anthony: Well, there's an affidavit on file by General Richardson to the effect that all of the General Orders, No. 1 to 53 were necessary for the prosecution of the war.

Mr. Ennis: Yes, I noticed that.

Mr. Anthony: I think to complete the record, we ought to have that in.

The Court: Received in evidence as Exhibit "R".

(Petitioner's Exhibit "R" was received in evidence.)

PETITIONER'S EXHIBIT R

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

25 August 1943

General Orders
No. 31

HABEAS CORPUS PROCEEDINGS AND INTERFERENCE WITH MILITARY PERSONNEL IN PERFORMANCE OF MILITARY FUNCTIONS PHOHIBITED.

1. Purpose.

1.01. This General Orders is issued to eliminate, prevent, and prohibit interference with military personnel in the performance of their military functions or duties within the Territory of Hawaii, and to eliminate, prevent, and ~~pro~~hibit interference with military operations within the Territory of Hawaii, and thereby to further the defense and internal security of the Territory of Hawaii.

2. Habeas Corpus Proceedings Prohibited.

2.01. No clerk, deputy clerk, other officer, or employee of the District Court of the United States for the Territory of Hawaii, or of any court of the Territory of Hawaii, shall accept or receive for filing in such clerk's office, deposit for filing, or file, or allow, authorize, or permit to be deposited

for filing, or to be filed in such clerk's office, or with such clerk, any application or petition for a writ of habeas corpus, or make, issue, or execute any summons, citation, decree, order, or other process in any habeas corpus proceedings.

2.02. No judge of the District Court of the United States for the Territory of Hawaii or of any other court of or within the Territory of Hawaii, shall accept or receive for filing with, in, or before such judge or court, or in the office of the clerk of such court, or with such clerk, deposit for filing or file or allow, authorize, order, or permit to be filed with, in or before such judge or court, or in the office of such clerk or with such clerk, any application or petition for a writ of habeas corpus.

2.03. No judge of the District Court of the United States for the Territory of Hawaii or of any other court of or within the Territory of Hawaii, shall authorize, allow, decree, order, direct, or permit any habeas corpus proceedings to be commenced, maintained, or prosecuted before or by such judge or in or before the court in or over which such judge sits or presides; nor shall any such judge maintain, prosecute, hear, try, or determine in whole or in part, any habeas corpus proceedings or any phase of, or matter related to or in any way connected with, any habeas corpus proceedings.

2.04. No judge of the District Court of the United States for the Territory of Hawaii or of any other court of or within the Territory of Hawaii, shall issue any writ of habeas corpus,

order that any writ of habeas corpus issue or be issued, or authorize, direct, permit, or allow any writ of habeas corpus to issue, or be issued, from the court over which or in which such judge presides or sits, or from the office of the clerk of said court, or by the clerk of said court.

2.05. No person, either in his own behalf or as attorney, agent, or in any way for or on behalf of another person, shall present to, file or attempt to file, or deposit for filing, any application or petition for a writ of habeas corpus, to or with the clerk, deputy clerk, a judge, other officer, or employee of the District Court of the United States for the Territory of Hawaii, or of any court of or within the Territory of Hawaii; nor shall any person either in his own behalf or as attorney, agent, or in any way for or on behalf of another person, commence, maintain, or prosecute any habeas corpus proceedings in or before the District Court of the United States for the Territory of Hawaii or in or before any other court of or within the Territory of Hawaii.

2.06. Neither the United States Marshal for the Territory of Hawaii, any deputy or employee of such marshal, or any other officer or employee of the District Court of the United States for the Territory of Hawaii, or of any other court of or within the Territory of Hawaii shall accept or receive for service an application or petition for a writ of habeas corpus or copy thereof, or any writ of habeas corpus, any summons, citation, order, de-

cree, warrant, or process of any kind in a habeas corpus proceedings; nor shall the United States Marshal for the Territory of Hawaii, any deputy of such marshal, or any other officer or employee of the District Court of the United States for the Territory of Hawaii, or any officer or employee of any court of or within the Territory of Hawaii, serve or attempt to serve any application or petition for a writ of habeas corpus or copy thereof, or any writ of habeas corpus, or any summons, citation, mandate, decree, order, warrant, or process of any kind in a habeas corpus proceedings or issued or arising out of any matter or proceeding related to or in any way connected with a habeas corpus proceedings.

2.07. Any judge of the District Court of the United States for the Territory of Hawaii, or of any other court of or within the Territory of Hawaii, before whom a habeas corpus proceedings now is pending, shall forthwith discontinue such habeas corpus proceedings, and shall not maintain or prosecute, or allow, permit, or authorize to be maintained or prosecuted before such judge or the court in which such judge sits or presides, such habeas corpus proceedings an further, and hereafter shall not hear, try, or determine said habeas corpus proceedings or any phase of or matter related to or in any way connected with or arising out of such habeas corpus proceedings; nor, except as authorized in paragraphs 2.08 and 2.09 herein, shall any such judge hereafter issue any order, decree, mandate, summons, citation,

warrant, or process of any kind in any such pending habeas corpus proceedings, or in any matter, action, or proceedings arising out of, related to, or in any way connected with any pending habeas corpus proceedings; and such judge forthwith shall withdraw, revoke, and rescind any order, decree, mandate, summons, citation, warrant, or process of any kind, remaining unexecuted in any pending habeas corpus proceedings or in any matter, action, or proceedings arising out of, related to, or in any way connected with any pending habeas corpus proceedings.

2.08. Neither the Honorable Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, nor any other judge of the said District Court of the United States in and for the Territory of Hawaii, shall make or issue, or order, direct, or cause to be made or issued, any process, mandate, summons, citation, order, decree, decision, determination, direction, or action in or relative to, or arising out of, by reason or because of, that certain habeas corpus proceedings now pending in the District Court of the United States in and for the Territory of Hawaii substantially styled or entitled as follows: "In the Matter of the Application of Walter Glockner," and bearing file or identification number or mark "H. C. 295," in the office of the Clerk of the District Court of the United States in and for the Territory of Hawaii. The said Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, forthwith and immediately shall stay, refrain from, cause to be

stayed, and desist from, all pending or further action or proceedings in said habeas corpus proceedings, or in any matter, action, or proceedings arising out of, related to, or in any way connected with, such pending habeas corpus proceedings.

2.09. Neither the Honorable Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, nor any other judge of the said District Court of the United States in and for the Territory of Hawaii, shall make or issue, or order, direct, or cause to be made or issued, any process, citation, order, decree, decision, determination, direction, or action in or relative to, or arising out of, by reason or because of, that certain habeas corpus proceedings now pending in the District Court of the United States in and for the Territory of Hawaii substantially styled or entitled as follows: "In the Matter of the Application of Erwin R. Seifert, "and bearing file or identification number or mark "H. C. 296," in the office of the Clerk of the District Court of the United States in and for the Territory of Hawaii. The said Delbert E. Metzger, Judge, District Court of the United States in and for the Territory of Hawaii, forthwith and immediately shall stay, refrain from, cause to be stayed, and desist from, all pending or further action or proceedings in said habeas corpus proceedings, or in any matter, action, or proceedings arising out of, related to, or in any way connected with, such pending habeas corpus proceedings.

3. Interference with Military Personnel Prohibited.

3.01. No judge of the District Court of the United States for the Territory of Hawaii, or of any court of the Territory of Hawaii, no United States Marshal for the Territory of Hawaii or his deputy, nor other public officer, deputy of such public officer, public employee, or any other person, shall, for any cause, whether or not such cause is deemed lawful cause by such judge, or other public officer, public employee, or any other person, in any manner, way, or form impede, oppose, or interfere with The Commanding General, United States Army Forces, Central Pacific Area, or with any other member of the armed forces of the United States, in his performance of his military functions, military duties, or military orders, or in his performance of any orders heretofore or hereafter issued by the Military Governor of the Territory of Hawaii regardless of whether or not such order or orders are published in the newspapers of the Territory of Hawaii; provided, however, that nothing contained in this paragraph shall be construed or deemed to prohibit municipal police officers from arresting members of the armed forces for traffic offenses triable by the Provost Courts.

4. Provisions of this General Orders to be Liberally Construed.

4.01. Except where otherwise clearly indicated, in addition to being applicable to habeas corpus proceedings hereafter commenced, the provisions of this General Orders shall be applicable to habeas

corpus proceedings heretofore commenced and now pending in the District Court of the United States for the Territory of Hawaii or in any other court of the Territory of Hawaii. The provisions of this General Orders shall be liberally construed so that the purposes for which this General Orders is issued, set forth in Paragraph 1.01, may be fully effected and accomplished.

5. Penalties.

5.01. Any judge of the District Court of the United States in and for the Territory of Hawaii, any United States Marshal or Deputy United States Marshal in and for the Territory of Hawaii, or any other public officer, deputy of such other public officer, public employee, or any other person, who directly or indirectly, expressly or impliedly, in any manner, shape, or form, shall violate, attempt to violate, evade, or attempt to evade, or aid, assist, or abet, in any violation of, any provision of this General Orders, upon conviction thereof by a Provost Court heretofore or hereafter appointed by the Military Governor of the Territory of Hawaii, shall be punished by confinement, with or without hard labor, for a period not to exceed five (5) years, or by a fine not to exceed five thousand dollars ($5,000.00), or by both such confinement and fine, or if convicted thereof by a Military Commission heretofore or hereafter appointed by the Military Governor of the Territory of Hawaii shall be punished as such Military Commission shall determine.

6. Issuance of this General Orders is Necessary

Exercise of Martial Law Powers of Military Commander in This Theater of War.

6.01. This General Orders is issued by the undersigned as Military Governor of the Territory or Hawaii and as the Military Commander of the military forces of the United States in this theater of war in which martial law duly has been established and exists. This General Orders is a necessary exercise of the martial law powers of the undersigned as Military Commander of the military forces of the United States in this theater of war.

S/ ROBERT C. RICHARDSON, JR.
Robert C. Richardson, Jr.
Lieutenant General, United States Army
Commanding General, United States Army Forces, Central Pacific Area
Military Governor of the Territory of Hawaii

A True Copy:

WM. R. C. MORRISON
Wm. R. C. Morrison
Colonel, J. A. G. D.
Executive

[Endorsed]: Filed 4-11-44.

Mr. Ennis: May I offer in evidence a copy of General Order No. 38?

The Court: Yes.

Mr. Ennis: I haven't it here at the moment, but with permission I will have it marked with the Clerk as the next in number.

The Court: Yes. That will be Exhibit 13.

(Respondent's Exhibit "No. 13" was received in evidence).

RESPONDENT'S EXHIBIT 13

Territory of Hawaii
Office of the Military Governor
Iolani Palace
Honolulu, T. H.

14 October 1943

General Orders
No. 38

RESCISSION OF GENERAL ORDERS

1. Rescission of General Orders No. 31, this Office, 25 August 1943.

1.01. General Orders No. 31, this office, 25 August 1943, hereby is rescinded.

By order of the Military Governor of the Territory of Hawaii:

/s/ WM. R. C. MORRISON
Wm. R. C. Morrison
Colonel, J. A. G. D.
Executive

A True Copy:

ROBERT B. GRIFFITH
Robert B. Griffith
Major, Infantry

[Endorsed]: Filed 4-11-44.

Mr. Anthony: We would also like to offer in evidence, if the Court please, a pamphlet which describes the activity of the VVV's. Your Honor will recall that immediately upon the outbreak of war, and it is shown by the record in this case, the Hawaiian [723] Territorial Guard was called into active service, and for a considerable period of time this Guard guarded installations in and about this Territory. And in January they were inactivated. Thereafter, the University members of that organization volunteered for duty with the Armed Forces, and this is the story of their volunteering and also the letter of General Emmons in regard to their activity.

Mr. Ennis: No objection.

The Court: Received as Exhibit "S".

(Petitioner's Exhibit "S" was received in evidence.)

PETITIONER'S EXHIBIT S

THE VOLUNTEER

[Printer's Note: Only the text of the pamphlet following is reproduced, the pictures and captions under the pictures being omitted.]

The Editor and His Staff Present

THE VARSITY VICTORY VOLUNTEERS

"Determined to undertake any task assigned to them in the line of their duty and responsibility as American citizens, one hundred fifty young Hawaiian Born Japanese who had been immobilized

Petitioner's Exhibit S—(Continued)

from the territorial guard volunteered their services en bloc to army authorities the other day.

They were students from the University of Hawaii who had decided to "Do Something Practical" in demonstrating their undivided allegiance to the United States and their loyalty to their flag and the ideals for which it stands.

Many of them made great sacrifices in abandoning their plans for higher education but they considered that the call of their country was of vastly more importance than any selfish ambition or desire for personal advancement."

Editorial in Hawaiian Herald
February 28, 1942

PROLOGUE

"This is more than an incident for passing notice. It is an illustration of one of manifold ways in which Americans of Japanese ancestry can serve their country in time of emergency.

These times are, admittedly, difficult for Americans of Japanese parentage.

The remedy for their difficult situation is basically with these young Americans of Japanese ancestry themselves.

They must, first, realize the fact that the militaristic regime of Japan has forced this situation on them and on all Americans.

Second, they must accept the further fact that there is bound to exist, particularly among Americans who have had little to do with this "second

Petitioner's Exhibit S—(Continued)

generation" a degree of uncertainty as to their attitude in time of dire emergency.

Third, they must conduct themselves loyaly and with absolute regard for the spirit and the letter of our laws and regulations, bearing cheerfully the inconveniences to which they may be put.

Fourth—and this is highly important—they must do as this group of 155 young citizens has done—seek out and find a way to serve their country and their community in this emergency.

It is one thing to accept passively a difficult situation which irks and burdens and grieves you. It is another thing—a better and finer thing—to take the initiative in finding ways and means to be a definite usefulness—to be an active and not a passive citizen of our republic in wartime."

Editorial in Honolulu Star-Bulletin
February 25, 1942

HISTORY

The history of this organization dates back to that black and fateful Sunday of December 7, 1941. When the University of Hawaii ROTC was called out in the emergency that day and organized into the Hawaii Territorial Guard, many of the present members enlisted. For two months these boys fulfilled the responsibilities of guarding and protecting the vital utilities and installations of the territory through the crisis. Then, a bombshell burst on January 19, 1942 and all members of Japanese ancestry were inactivated from the services of the Guard with honorable discharges.

Petitioner's Exhibit S—(Continued)

This was indeed a terrible blow. These boys had served with loyal and ernest endeavor and with pride in being able to do their part for their country. Now, they had been told that their services were no longer needed.

After the first wave of bitter disappointment and frustration had passed, they realized that it was no time to sit passively and bemoan their grievous situation when, instead, they could actually be searching for other ways and means to serve their country; that in their country's darkest hour of need and danger, they must prove themselves useful in some other phase of the war effort.

One day during their period of ferment, a small group of those discharged from the HTG met with a few interested and sympathic civic leaders and in the ensuing discussions, the deep-seated desire of these boys to contribute their services to the war effort now augmented by another burning desire to demonstrate their Americanism to dispel all doubts of their loyalty and sincerity, were plainly manifested. The next question was, "What were they going to do about it?"

Yes, the boys decided to do something about it; to do something in terms of bold, concrete action no amount of words could ever prove equal. They decided to petition the military governor to explain their peculiar situation and to offer themselves unconditionally for whatever helpful service they could contribute toward the defense of their homeland and toward the winning of the war. Thus a petition

Petitioner's Exhibit S—(Continued)

was drawn up and plans for meeting and organization were formulated, all done with due notification to proper authorities.

There were clouds of doubt and suspicion that had to be cleared from ignorant and hysterical minds by strong, active deeds, not mere spoken words of loyalty and oaths of allegiance.

Therefore, a meeting was called to mobilize as many of the former Guardsmen as possible attending the University and those in town, and the petition, after much discussion and explanation of the critical position of the Japanese in Hawaii, was presented for their approval and acceptance. This petition, signed and presented to the military governor, Lt. General Delos C. Emmons, appears as follows:

Honolulu, T. H.
January 30, 1942

Lt. Gen. Delos C. Emmons
Commanding General, Hawaiian Department, U. S. A.
Fort Shafter, T. H.

Sir:

We, the undersigned, were members of the Hawaii Territorial Guard until its recent inactivation. We joined the Guard voluntarily with the hope that this was one way to serve our country in her time of need. Needless to say, we were deeply disappointed when we were told that our services in the Guard were no longer needed.

Hawaii is our home; the United States, our

Petitioner's Exhibit S—(Continued)

country. We know but one loyalty and that is to the Stars and Stripes. We wish to do our part as loyal Americans in every way possible and we hereby offer ourselves for whatever service you may see fit to use us.

Respectfully yours,

The general was very pleased with the gesture and accepted the boys as a labor corps under the Hawaiian Department Army Engineers, to be housed as a unit and to work in conjunction with the army engineers. Then followed a scant one day notice for preparation and mobilization in which they left their jobs and withdrew from classes to answer the call, and on the morning of February 25, 1942, a group of volunteers, calling themselves the "Varsity Victory Volunteers," assembled on the steps of Hawaii Hall, on the campus of the University of Hawaii, to be tendered with a simple aloha ceremony by civic leaders, college officials and former classmates of the University.

ORGANIZATION

The organization of the Varsity Volunteers is a unique, complicated, and pyramided integration of several bodies.

First, the organization is officially known as the Corps of Engineers Auxiliary, attached as a company to the 34th Combat Engineers Regiment; and therefore directly responsible to the U. S. Army Corps of Engineers. The pride of the organization is the splendid and ef-

Petitioner's Exhibit S—(Continued)

ficient Army Personnel. The Commanding Officers are Lt. Colonel William Sexton, 34th Combat Engineers Regiment, and Capt. Richard Lum, Corps of Engineers Auxiliary. Company Commander Capt. Lum is ably assisted by Executive Officer Lt. Thomas Kaulukukui and Master Sergeants George Aikau and William Jarrett.

Second, the men are employed under Federal Civil Service Regulations.

Third, the members are divided into twelve work gangs, each under the leadership of an elected foreman. These squad foremen are "lorded" over by Supervisor Ralph Yempuku and his assistant, Ted Tsukiyama. The foremen concern themselves chiefly with the supervision of the work projects and meet with the Army Personnel every Thursday evening to exchange ideas. Squad foremen are Richard Chinen, Junichi Buto, Richard Yamamoto, Unkei Uchima, Harry Tanaka, Masato Doi, Sukeyoshi Kushi, Chiyoki Ikeda, Masaichi Sagawa, Claude Takekawa, Robert Kadowaki, and Henry Oyasato.

Fourth, every first Monday of a month, a general meeting is called to order by Supervisor Ralph Yempuku. The minutes of the meetings are kept by the elected secretary, Katsumasa Tomita, and the Company Fund is in the custody of the able treasurer, Henry Oyasato.

Equality is the Keynote of this assembly and foremen, army personnel, laborers, debate, discuss, and disagree. All are priviledged to express their

Petitioner's Exhibit S—(Continued)

views, to make suggestions, and to initiate motions.

For the best interest and welfare of the members, two standing committees have been appointed by the Chairman. These are the Membership Committee, which interviews new members, and the Morale Committee. The last named committee is headed by Shiro Amioka. It promotes and sponsors such activities as monthly dances, conferences, and essay and oratorical contests. It also investigates complaints and suggests remedies. Other members of the committee are Edward Okazaki, Ted Tsukiyama, Katsumasa Tomita, Herbert Isonaga, Chiyoki Ikeda, Unkei Uchima, David Miura, Yutaka Nakahata, Daniel Betsui, and Takashi Shikuma.

PERSONNEL

ROSTER OF VVV MEMBERS

	Name	Home Address
1.	Akimoto, Tamotsu	925-D Robello Lane, Honolulu
2.	Amioka, Shiro	518-A Ahui St., Honolulu
3.	Amioka, Ted T.	2627 S. King St., Honolulu
4.	Aoki, Tsugio	Kona, Hawaii
5.	Asano, Fred N.	1820-G Waiola St., Honolulu
6.	Betsui, Daniel D.	Hanapepe, Kauai
7.	Buto, Junichi	844 Pumehana St., Honolulu
8.	Chinen, Jenhatsu	Honouliuli, Ewa, Oahu
9.	Chinen, Richard K.	1956 Kilauea Ave., Hilo, Hawaii
10.	Doi, Masato	Paauhau, Hawaii
11.	Doi, Wallace T.	Port Allen, Kauai
12.	Emura, Edward T.	Lahaina, Maui
13.	Fujioka, Shigeo	1560 Miller St., Honolulu
14.	Fujita, David	1358 Kam IV Road, Honolulu
15.	Fujita, Yasuhiro	529-C Malanai Place
16.	Fujitani, Atsushi	Kapaa, Kauai
17.	Furukawa, Sumu	810 Gulick Ave., Honolulu
18.	Goto, Walter R.	Box 33, Station C, Upper Oili Road, Honolulu

Petitioner's Exhibit S—(Continued)

Personnel—Roster of VVV Members—(Continued)

	Name	Home Address
19.	Hamaguchi, Akira	971-A Robello Lane, Honolulu
20.	Hamaishi, Clarence Y.	2147 Dole St., Honolulu
21.	Harunaga, Toshio	Box 171, Honokaa, Hawaii
22.	Hashimoto, Akira	2455 Huene St., Honolulu
23.	Hashizume, Shuichi	Lahaina, Maui
24.	Hayashi, Yoshimi	3383 Manoa Road, Honolulu
25.	Hedani, Takao	302 N. School St., Honolulu
26.	Higa, Warren T.	1730-B Olona Lane, Honolulu
27.	Higashino, Edwin T.	1145 15th Ave., Honolulu
28.	Himeda, Kikuji	1508-A River St., Honolulu
29.	Himoto, Teruo	Box 226, Waialua, Oahu
30.	Hirai, Seichi	Box 158, Lanai City, Lanai
31.	Hirano, Yoshiyuki	Lanai City, Lanai
32.	Hirono, Howard M.	Box 928, Wahiawa, Oahu
33.	Hirota, Jyun	4758-H Farmers Road, Honolulu
34.	Honda, Edwin H.	Wailuku, Maui
35.	Hoshijo, Anki	Hilo, Hawaii
36.	Iha, Edward S.	1214 N. School St., Honolulu
37.	Ikeda, Chiyoki	1402 Liliha St., Honolulu
38.	Ikehara, Minoru	Kalaheo, Kauai
39.	Ishihara, Stanley S.	1253 Hall St., Honolulu
40.	Ishii, Shigeru	634 Wajakamilo Road, Honolulu
41.	Isonaga, Herbert S.	Box 185, Koloa, Kauai
42.	Iwasa, Walter M.	Box 527, Wahiawa, Oahu
43.	Kadowaki, Robert N.	2025 Kealoha St., Honolulu
44.	Kagawa, Shoso	618 McNeill St., Honolulu
45.	Kajihara, Takashi	Lahaina, Maui
46.	Kashiwada, James T.	234 N. School St., Honolulu
47.	Kato, Hiroshi	3228 Waiana Ave., Honolulu
48.	Kawabata, Taketo	Captain Cook, Kona, Hawaii
49.	Kawabe, Toshiro	968-A Akepo Lane, Honolulu
50.	Kawate, Kenneth K.	Waimea, Kauai
51.	Kikawa, Robert S.	1223 15th Ave., Honolulu
52.	Kimura, Stanley T.	Box 171, Waipahu, Oahu
53.	Kitagawa, Isamu	Kahului, Maui
54.	Kobayashi, Roy T.	894 S. Queen St., Honolulu
55.	Kono, Kiyoshi	1246-A Aala Lane, Honolulu
56.	Kuniyoshi, Hideo	Box 154, Hilo, Hawaii
57.	Kushi, Sukeyoshi	Wailuku, Maui
58.	Makino, Hideo	925-B Coolidge St., Honolulu

Petitioner's Exhibit S—(Continued)

Personnel—Roster of VVV Members—(Continued)

Name	Home Address
59. Manabe, Benjamin M.	Lihue, Kauai
60. Matsumoto, Rancefford Y.	Hana, Maui
61. Matsunaga, Joseph J.	Box 756, Wahiawa, Oahu
62. Mayeda, Thomas	1724 9th Avenue, Honolulu
63. Mikami, Yoshiharu	3324 Campbell Ave., Honolulu
64. Minami, Hiroshi	Lawai, Kauai
65. Mita, Wilfred M.	Box 605, Wahiawa, Oahu
66. Miura, David M.	Box P, Kapaa, Kauai
67. Miyake, James S.	Port Allen, Kauai
68. Miyake, Walter S.	Port Allen, Kauai
69. Miyashiro, Yeiyu	Ookala, Hawaii
70. Morisako, Henry H.	534-A Holokahana Lane, Honolulu
71. Morisawa, Soji	920 Ahana Lane, Honolulu
72. Morita, Tom T.	Kapaa, Kauai
73. Murata, Robert S.	1608 McGrew Lane, Honolulu
74. Nagahisa, Henry S.	686 S. Hotel St., Honolulu
75. Nagaji, Grover K.	Box 387, Waipahu, Oahu
76. Nagao, Wallace T.	Halaula, Kohala, Hawaii
77. Nagasako, Melvyn M.	Lahaina, Maui
78. Nagata, Shogo	1103 Pinkham St., Honolulu
79. Nakagawa, Yoshio	711 Kunawai Lane, Honolulu
80. Nakahata, Yutaka	1014-2 Webb Lane, Honolulu
81. Nakama, Henry S.	2445 Ferdinand Ave., Honolulu
82. Nakamine, Roy K.	Makena, Maui
83. Nakamura, Allan I.	Holualoa, Kona, Hawaii
84. Nakamura, Edward H.	1349 10th Ave., Honolulu
85. Nakashima, Shigemitsu	1651 Alaneo Place, Honolulu
86. Namba, Ryoji	254 Moomuku Place, Honolulu
87. Narusaki, Mamoru	Kahaluu, Oahu
88. Nikaido, Thomas T.	964-D Robello Lane, Honolulu
89. Nishikawa, Akio	Paia, Maui
90. Nishimura, James S.	732 7th Ave., Honolulu
91. Nogawa, Raymond K.	57 Holt Lane, Honolulu
92. Nosaka, Seichi	1728 Kam IV Road, Honolulu
93. Oka, George K.	1353 Davis Lane, Honolulu
94. Oka, James I.	Waialua, Oahu
95. Okazaki, Edward Y.	Paia, Maui
96. Okubo, Yoshio	1266 Matlock Ave., Honolulu

Petitioner's Exhibit S—(Continued)

Personnel—Roster of VVV Members—(Continued)

	Name	Home Address
97.	Okubo, Yugo	1266 Matlock Ave., Honolulu
98.	Okuda, James T.	853 Coolidge St., Honolulu
99.	Okumoto, Walter T.	131 Koalele St., Honolulu
100.	Onaga, Mitsuru	Papaikou, Hawaii
101.	Ono, Masao	180 N. King St., Honolulu
102.	Ono, Morimasa	2564 Kam IV Road, Honolulu
103.	Ono, Seichi	Puunene, Maui
104.	Ono, Tamotsu	554 Waipa Lane, Honolulu
105.	Onodera, John T.	3518 McCorriston St., Honolulu
106.	Otani, Akira	2425 East Manoa Road, Honolulu
107.	Oyasato, Henry C.	Box 130, Koloa, Kauai
108.	Sagawa, Masaichi	Box 136, Hawi, Hawaii
109.	Saito, Herbert T.	231 Magelian Ave., Honolulu
110.	Sakamoto, Ronald Y.	Wahiawa, Oahu
111.	Saruwatari, Kenneth K.	1214 Auld Lane, Honolulu
112.	Sato, Harry N.	Lawai, Kauai
113.	Serikawa, Fumio	Kohuku, Oahu
114.	Shikuma, Takashi	899 Kilauea Ave., Hilo, Hawii
115.	Shintani, Thomas T.	1733 Ashford St., Honolulu
116.	Suzuki, Terry T.	964-B Robello Lane, Honolulu
117.	Takara, John H.	3443 Winam Avenue, Honolulu
118.	Takekawa, Claude Y.	1560 Kam IV Road, Honolulu
119.	Takemoto, Kaname	Kapaa, Kauai
120.	Takizawa, Garret T.	920 Cedar St., Honolulu
121.	Tanaka, Harry T.	1632 Aupuni St., Honolulu
122.	Terada, Herbert M.	1436-A Liliha St., Honolulu
123.	Tokuyama, George H.	153 N. Kuakini St., Honolulu
124.	Tomita, Hiroichi	Wailuku, Maui
125.	Tomita, Katsumasa	207 Ululani St., Hilo, Hawaii
126.	Tottori, Calvin A.	4429 Ahuawa Place, Honolulu
127.	Toyota, Ralph H.	1441 Liona Place, Honolulu
128.	Tsuji, Ernest Y.	1921 Kalai Road, Honolulu
129.	Tsukazaki, Norman T.	1123 1st Ave., Honolulu
130.	Tsukiyama, Ted T.	1042 17th Ave., Honolulu
131.	Uchima, Unkei	Lawai, Kauai
132.	Ueki, Wilfred O.	Box 652, Paia, Maui
133.	Urabe, Howard M.	Kapaa, Kauai
134.	Uyeda, Kenichi	711-C Middle St., Honolulu
135.	Uyeda, Kenso	557 Pokole St., Honolulu
136.	Uyehara, Harry K.	Box 289, Honokaa, Hawaii

Petitioner's Exhibit S—(Continued)

Personnel—Roster of VVV Members—(Continued)

Name	Home Address
137. Uyemura, Richard S.	Box 2725, Honolulu
138. Uyetake, Joso	Wailuku, Maui
139. Watanabe, Stanley	Wailuku, Maui
140. Watase, Edward K., Jr.	Port Allen, Kauai
141. Yabusaki, George H.	803 Kaaloa St., Honolulu
142. Yamada, Allen H.	Box 169, Koloa, Kauai
143. Yamada, Edward Y.	2157 Liliha St., Honolulu
144. Yamaguchi, Tokio	Waipahu, Oahu
145. Yamamoto, George K.	931 Robello Lane, Honolulu
146. Yamamoto, Joji	1326-B College Walk, Honolulu
147. Yamamoto, Richard S.	515 Malanai Place, Honolulu
148. Yamamoto, Satoki	Honokahua, Maui
149. Yanagi, Glenn	478 Pau Lane, Honolulu
150. Yasuda, Joseph K.	921-A Robello Lane, Honolulu
151. Yempuku, Ralph T.	809 Laula Way, Honolulu
152. Yokoyama, Kauame	Hanapepe, Kauai
153. Yoshimasu, Masato	Paia, Maui
154. Yoshimoto, Tsugio	971-B Robello Lane, Honolulu
155. Zakimi, Saiji	Hakalau, Hawaii
156. Zukemura, Richard H.	39-B Holt Lane, Honolulu

FORMER MEMBERS OF THE VVV

157. Chinen, Masahide	R.F.D. Box 24, Haiku, Maui
158. Fujitani, Yoshiaki	925 Kapaakea Lane, Honolulu
159. Honma, Tsuneo	National Park, Hawaii
160. Ikeda, Tadashi	c/o Waimea High School, Waimea, Kauai
161. Kimura, Kongo	c/o Pahoa School, Pahoa., Hawaii
162. Kogami, Toshiyuki	818 Dillingham Blvd., Honolulu
163. Komoto, Iro	1722 Liliha St., Honolulu
164. Komesu, Phillip	1367 Miller St., Honolulu
165. Miyasaka, George	229 Hali St., Honolulu
166. Kagihara, Allen	1726 Anapuni St., Honolulu
167. Taketa, Morris	1483 S. King St., Honolulu
168. Takemura, Tadashi	650 Laukapu St., Hilo, Hawaii
169. Yamaoka, Noboru	Hilo, Hawaii
Capt. Richard T. F. Lum	212 Koalele St., Honolulu
Lieut. Tommy Kaulukukui	1260-A Ekaha St., Honolulu
M/S William K. Jarrett	3350 Maunaloa Ave., Honolulu
M/S George F. Aikau	27 Maluniui Ave., Ceconu Grove, Kailuta, Oahu

Petitioner's Exhibit S—(Continued)

PERSONALITIES

Shiro Amioka, known to his mates as Cub, he was the toughest, the sweetest and the workingest little guy in the qaurry gang. Always a big hit with the girls, he was the pride and joy of Hale Laulima.

Tsugio Aoki: "Pablo" was the biggest liar of Victory Hall. His lies were so good, he believed them himself. Baby-faced and cheerful, he never shirked in his work. Working with him was always a joy.

Fred Asano, who lived on and for gambling. Living by the grace of Lady Luck, "Johnny" was in the height of estacy one day or in the depth of misery the next. His toothless smile was a thing of beauty.

Daniel Betsui, quiet and assuming. Never a flat note in his singing, Danny was the singingest guy in the VVV.

Richard Chinen, the bull of the kitchen. His menacing presence in the mess hall made even the worst GI beans taste decent. A swell guy in any man's opinion.

Wallace Doi, the problem child of Varsity Hall. Wally was the constant source of Ralph Yempuku's nightmares. He tried every trick to get out of work, but always never succeeded. His hobby was cleaning barracks.

Shuichi Hashizume: Hash was never a good poker player, but he was conscientious and charitable. He got drunk on one bottle of beer and always slept early.

Petitioner's Exhibit S—(Continued)

Takao Hedani, who wanted to be called Mike. But he wasn't the type. Hedani was always a good worker, a good eater, and a good griper.

Warren Higa: More fat than brawn, slower than an ox cart, he was aptly named "Blubber". He had a thundering voice, full of sound and phooey. He loved to mould himself into a chair, especially at work.

Edwin Honda, always a better worker than a talker. Eddie was full of good habits. He always bought a bond, was always up early, and always got sick.

Edward Iha, the unsung hero of the kitchen crew. He looked fat and sloppy but he worked hard just the same. Mike was always there to hand the boys an extra helping.

Herbert Isonaga, born and bred a gentleman. He got rough, he got drunk, but he was always a gentleman. The boys all liked him, the girls more.

Robert Kadowaki, who knew every corner and every girl at Hale Aloha. Wacky was the undisputed leader of the wolf pack that haunted Hale Aloha on Sundays. Too bad he wasn't as good a worker as a lover.

Sukeyoshi Kushi who lived with his golf clubs. Goosie golfed every afternoon but he could never keep his waistline down. He drove the boys nuts with his phonograph but they all liked him for his industriousness and cheerfulness. He never had a girl but he always talked about them.

Petitioner's Exhibit S—(Continued)

Joseph Matsunaga: Joe was all noise and no sense. His intentions were always better than his deeds. He loafed at every opportunity and worked only on his days off. Care free and humorous, he was nice to have around.

Roy Nakamine, the sleeping beauty of Victory Hall. He slept in the morning, he slept at work. He slept at noon. And he slept at night. He just slept.

Yoshio Okubo: "Rowdy" was never happy unless he was working or talking in his sleep. He hardly spoke a word at work and did his job cheerfully. But at night he was a terror. He cussed at everybody and sang, "Johnny Doughboy" all while sleeping.

Henry Oyasato, who had the thankless job of trying to keep busy in the office. He was always popular on Pay Day. Hank loved to worry and the boys' welfare came first with him. He was never grouchy and his hair was always in place.

Mitsuru Onaga: Poor David! His body outgrew his legs. He could never live down his shortness. Even Ralph called him Shorty. But David made up for the height he lacked with voluminous talking.

Kenneth Saruwatari, 170 pounds of belly and hot air. His favorite pastimes were bragging and playing poker, but he was never good at both. Saru could work when he wanted to, but he never wanted to. He was a good truck driver while he lasted, but he didn't last long. He loved to smoke, but he never carried his own cigarettes. Wherever he went,

Petitioner's Exhibit S—(Continued)

he never forgot to be himself—noisy, mischievous, bothersome, but nice.

Harry Tanaka, who took many baths but could never get the dirt off his face. "Nigger" was a paradox. He read the best books and he drank the worst liquor. He was the best orator and he used the vilest language at work. He was the hard-working foreman and an irresponsible rowdy. He was serious one moment corny the next. "Nigger" was just plain unpredictable.

Katsumasa Tomita, the paragon of goodness. Kats had his lighter moments but he was usually serious. He took his baking seriously. He took his reading seriously. And he took his girls seriously.

Unkei Uchima: "Five by five" Unkei was a mass of gentleness. Only on the football field did he utilize his massive physique. He was always ready with a kind word or a helping hand. Popular with his men, he worked the hardest and the longest.

Joso Uyetake, the tragicomic figure of Victory Hall. He made a sad picture trying so hard to make his hair behave. Jo tried everything from vitalis to axle grease to keep his hair down. He was always plugging.

Edward Watase, whose familiar sight as he limped off to sick call, was known to everybody. Funny how he used to get sick so conveniently. His lifelong ambition was to outbluff Wally Doi at poker. He did a good job of fooling Ralph though.

Ted Tsukiyama, whose New Year's resolution

Petitioner's Exhibit S—(Continued)

was to concentrate on one girl, but never quite succeeded. His wolfing expeditions were the talk of the camp. His chores were to talk about girls, talk to girls, and to be talked to about girls.

George Yamamoto, the human encyclopedia. He was so unobtrusive that no one realized how much he knew until he came out with some incredible knowledge. George was full of appropriate repartee and made a delightful companion.

Ralph Yempuku, who never scolded, never frowned, never said no and never overslept. Ralph's hobby was to get the boys out of bed. He loved big cigars like all other little guys.

SLUMMING WITH THE 3V's

"Ta-ta-ta-ta!" The clear call of the regimental bugler heralds the break of another day. At that instant the buzzer in the barracks jangles noisily that it is 6:15 AM and time to get up. Gradually the barracks come to life. Squeaking of beds, clatter of shoes and slippers, mumbling of voices and music from radios begin to be heard.

Going to the washroom, the familiar sight greets the eyes: people waiting in line—sometimes three deep—to reach the wash basins. Breakfast is served at 6:30. Really G. I. at that! Nowhere else can one taste such coffee and bacon except in the Army. Making up the bunks—the first chore of the day for each member—is undertaken. Sloppy bunks, neat bunks—all express the person's personality. As a whole the bunks are well made.

Petitioner's Exhibit S—(Continued)

The 7:30 assembly buzzer rings. People pour out from the three barracks, respectively named Varsity Hall, Victory Hall, and Volunteers Hall. Roll call is taken and whatever announcements there are to be made are given to the whole group at this time by Captain Richard Lum or Supervisor Ralph Yempuku. Work assignments are handed out and the group disperses to the various jobs—some to Kunia, others to the 3W road project, and others to the Engineer DP.

A shrill whistle announces that it is 11:45 and time to go back for lunch. The lunch buzzer rings precisely at 12 noon. What's on the menu today? The boys are so hungry they are ready to eat anything. Pork and beans—the Army's delicacy greets their eyes. The boys fall to with vigor. For the next 15 minutes or so, the silence is unbroken except by the clatter of plates, knives, and forks. Gradually conversation is heard. Somebody tells the latest rumor he has heard. The next person questions it or adds to it. A joke—laughter. The scene is like any gathering of healthy young boys enjoying life.

A truck takes lunch out to boys working on the road. Passing a steam roller on the road one receives a hearty smile from the operator. With that vacancy in his mouth he looks just like "Jack O'Lantern" Yasuda. He is James Nishimura who recently made a trip to the regimental dentist and was scared out of his wits when the lieutenant asked the captain how to pull his tooth. Passing

Petitioner's Exhibit S—(Continued)

a gang spreading rocks on the road one goes further and sees a group of boys here and another further on laying culverts and building headwalls. The lunch wagon is always a welcome sign for these boys.

Exactly 4:30—the boys come home. Half an hour until supper is served. Showers start going full blast; wash basins are overcrowded. Mailman Yoshiharu Mikami comes around with missives for the lucky ones. Again he shouts, "Kikuji Himeda. Letter for you!."

Yum! Yum; Chicken a la king for supper. The hungry boys fall to with eagerness and store away great quantities for food in a short period of time. The way the food is downed gladdens the heart of any good cook.

"Orchestra Wives" starring George Montgomery, Ann Rutherford, and Glenn Miller's band is playing at the Post Theatre 4 at 5:30. After finishing supper boys with gas masks can be seen hurrying to the show.

Other boys play basketball in the inter-barracks tournament. The passing and shooting combination of Claude Takekawa and Joe Okumoto of the Volunteers Hawks draws acclaim. Other boys play golf on the neighboring golf course. The drives and putting of Sukeyoshi Kushi, 1942 Maui champion, serve as models for golf enthusiasts like Grover Nagaji and Ted Tsukiyama. Taking a peek into the bar-bell room one may see Akira Hashimoto, Akio Nishikawa, and Ranceford Matsumoto building up their muscles.

Petitioner's Exhibit S—(Continued)

Twilight and gradually evening creeps on. Lights from unblacked out barracks go out one by one until no lights are seen after 7 PM. People crowd into the reading rooms—some to read magazines and books; others to play friendly games of poker. Quite a number of boys can be seen in Boomtown —an amusement center for the 34th Engineers— playing billiard, ping pong, and African golf. Cold drinks are served there every night.

As the short hand creeps around the clock, the squeaking of beds and finally only the soft breathing of sleepers can be heard. Another day has gone by and the VVV faces the morrow with anticipation —to do their best, come what may.

ACTIVITIES

The intent of the VVV being to produce for the winning of the war, the first concern of the group was the work that lay ahead. Starting with the building of prefabricated houses, its first major project, the group has laid by within a period of one year, the following record of achievements: Six warehouses, large and small, and a large repair shop built; several miles of barbed wire strung; tons of rock quarried; numerous cabinet shop articles such as chairs, desks, tables, lamps, blackboards, bulletin boards, mess hall articles, trophy cases, and recreational facilities produced and being produced; a road job completed, two new roads under construction; and odd jobs continually engaged in, such as barracks maintenance and gen-

Petitioner's Exhibit S—(Continued)

eral construction and repair. Under the latter head came such jobs as building a washing ramp, renovation Regimental Headquarters, the Regimental Supply Office and Officers' Quarters, building a reviewing stand and blacking out the Post Bowl. The above, though brief, represents forty-eight hours spent per week for a period of one year and constitutes the major activity of the VVV.

Foremost in popularity and participation among recreational activities was Sports. Sports in the VVV was divided into the following classes to encourage as much participation as possible by the group: Inter-Barracks competition; Intra-Regimental competition; Regimental teams and the VVV teams.

At the half-year celebration medals and trophies were awarded to VVV members for outstanding participation in sports. The Varsity Hall Tigers won the team championship. Hiroichi Tomita, Stanley Watanabe, and Seichi Ono received medals for individual competitive ability.

With the advent of the football season, the VVV organized two teams, one to enter the Citywide League 135 lb. barefoot league, and the other, unlimited in weight, to take all comers for the sheer love of the game. The two teams, both of them coached by Lt. Tommy Kaulukukui, gave a very good account of themselves, the 135 lb. team finishing with three wins against two losses, and the unlimited team breezing through its schedule unde-

Petitioner's Exhibit S—(Continued)

feated. Besides winning several minor skirmishes, the unlimited team laid away a record of a 12-6 win over the Governors of Farrington High School and a 13-0 victory over the Rough Riders of Roosevelt High—both members of the Honolulu Interscholastic Conference. The 135-lb. team went through its 1942 season in the following manner:

Sept. 19	Diamond Packers (a pre-season game)	12	VVV	0
Oct. 4	Waialae	6	VVV	7
Oct. 11	Moiliili	0	VVV	13
Oct. 24	Diamond Packers	13	VVV	0
Oct. 31	Sheridan A. C.	13	VVV	0
Nov. 15	Nalo O Maumau	0	VVV	21
Jan. 1	Chow Hounds (in the Pineapple Bowl)	0	VVV	27

Elated with the successful conclusion of a tough season which was topped by a brilliant victory over the Chow Hounds from the 47th Engineers in the opener of the New Year's doubleheader, and having been infested with spirit of competition, the VVV entered a team in the American Division of the Post Basketball League.

The VVV has thus far won five games and lost three.

Engineer Red Men	12	VVV	53
Signal Corps Hawkeyes	25	VVV	22
Engineer Volcanoes	18	VVV	43
Q. M. C. Aces	20	VVV	41
Ordnance Tarheels	18	VVV	39
Hq. Braintrusters	38	VVV	28
Brown Bombers	17	VVV	49
Infantry Wheelmen	29	VVV	27

Petitioner's Exhibit S—(Continued)

Overshadowed by sports, but none the less fully participated in and enjoyed, were social activities such as community sing, glee club, indoor games, movies, and dances which served to acquaint members with one another.

Monthly dances for VVV members and their guests were held on Sunday afternoons in Hemenway Hall on the campus of the University of Hawaii. These were informal dances to which residents of Hale Aloha and Hale Laulima—University women's dormitories—were invited. These affairs were planned and sponsored by the members to fill a need for social activities during the weekends.

Hale Laulima, in turn, staged several Saturday night socials to which VVV members were invited.

Life in the VVV was by no means confined to athletics and social activities. The members of the VVV being predominantly from the University, intellectual activities were shown a lot of interest. Coming first on the list of such activities were the extension courses which were offered the VVV members by the University of Hawaii. Four such courses were taken and completed. They were Postwar Worlds—a course in political science; Religion and Literature; Mathematics; and Physical Education.

Required by the Army were lectures and instruction on first aid and on gas warfare. These the VVV learned with keen interest. The lectures were delivered intermittently by members of the medical

Petitioner's Exhibit S—(Continued)

staff and dealt with fractures, hemorrhage, shock, and their treatment. The description and detection of poisonous gases were taught the VVV through lectures and movie film.

Other phases of activities were model airplane construction and the maintenance of a Victory garden.

Reminiscing during idle moments, VVV men will recall the many memorable experiences they have had during the past year in service. In their minds, members will experience anew their outstanding achievements. No one will find it difficult to place outstanding events in a cozy nook of his cranium to be brought out during his "pipe and chair" age.

The prick of a needle will doubtlessly flash back and bring recollections of the trips made to the blood bank. Three times during the past year, the VVV's made a call at the bank, each man giving from 350 to 500 cc. of precious blood each time. Some went to escape from work for the day and the meal that came after the operation, but the great majority went because they wanted to do their bit for a worthy cause.

While not outstanding, for everybody seems to be doing it, the VVV is nevertheless, proud of its bond parade. Every month, the members of the VVV sank a sizeable sum in war bonds ranging in denominations from $25 to $125. As of January, 1943, the VVV showed a record of $27,850 worth

Petitioner's Exhibit S—(Continued)

of bonds bought in a period of ten months beginning in April, 1942.

Serving on an entirely voluntary basis and without pay, Masato Doi and Tamotsu Ono acted as supervisors for the Junior Victory Brigade during a six-week period in the summer of 1942. The Brigade, composed of young boys between the ages of 12 and 15, was organized to aid in the war effort. With capable Doi and Ono at the helm, the Brigade had a successful campaign during the summer.

Harry Tanaka won the Annual Bernda Extemporaneous Speaking Contest on May 21 at the University of Hawaii speaking on the "Preservation of Free Speech." Tanaka also copped the VVV First Annual Oratorical Contest on July 16, speaking on "The Road Ahead" as being one "drenched with blood, sweat and tears." Grover Nagaji took second place in the open division. On the same night, Hiroshi Minami convinced the judges that he was the best orator in the novice division with his talk on "Physical Fitness for Victory." Trailing him were two fellow members of the Quarry Gang, Ryoji Namba and Richard Uyemura. The first place winners of both divisions received $25 war bonds as their prizes.

In the literary field, Masato Doi distinguished himself when he received honorable mention in the Charles Eugene Banks Literary Contest held at the University of Hawaii. Dai's entry was a letter entitled "Frankie."

Kenichi Uyeda ran off with the grand prize in

Petitioner's Exhibit S—(Continued)

the Slogan Contest held in May, 1942, by the Morale Committee. His winning slogan was: "Work up a sweat, and the Sun will set." Stanley Kimura's "Cleanliness leads to Healthiness" won for him a prize while Walter Iwasai's "Let not our efforts be in vain" was adjudged the best for general use.

When it came to celebrating occasions, the VVV's went all-out for a good time. The first big blow-up came on August 22, 1942, after six months of hard work when everyone took time off to celebrate the half-year anniversary of the organization with a big luau staged at the University of Hawaii amphitheater. Many distinguished guests were present that day representing the Army, University of Hawaii and the community. A dance on the following day at Hemenway Hall wound up the festivities for the occasion.

Luaus seem to be the Triple V's favorite way of celebrating, for another one headlined the Christmas feast in the mess hall. Through the generosity of George Higa, proprietor of the Honolulu Cafe, delectable Hawaiian dishes were enjoyed by the members and their guests. Christmas felt like the Christmas of old that night with appropriate decorations adorning the mess hall, carols ringing out from many voices, and the spirit of giving manifested through a grab-bag.

Petitioner's Exhibit S—(Continued)
LETTERS

I think something like this may do as a message to the VVV's on their first anniversary. It is not long, but it is heartfelt.

V.V.V.—The Most Honored Initials in Hawaii!

These initials stand for a way of meeting a serious crisis, and that way will redound to the credit of all Americans. The Varsity Victory Volunteers and their wholehearted effort represent more than a mere episode in our history; they represent the high quality of our civilization. Let the ringing words of praise by General Emmons stand for Hawaii's appreciation of these Americans.

With all good wishes,

Sincerely yours,

Signed: GREGG M. SINCLAIR
President (U. of H.)

To the Varsity Volunteers:

Much has happened since we met on the steps of Hawaii Hall and you began your service to our country as an organized unit. It was not the kind of service which you would have preferred to give, but it was service of a kind which you could give and it was needed. You have carried on through your first year with the same spirit of loyalty which was the basis for your offer to serve in whatever way the Commanding General could use your help. You have held fast to your ideals. You have made an outstanding record and have won the

Petitioner's Exhibit S—(Continued)

respect and admirations of many who were doubtful of the stand which you citizens of Japanese ancestry would take. You have fully justified the confidence of those of us who knew that you are as loyal as any other citizens of different racial descents. I am proud of what you have done.

To you all I send my congratulations and aloha!

Signed: C. R. HEMENWAY

January 23, 1943

Varsity Victory Volunteers
34th Engineers Regiment
A.P.O. 957

Gentlemen:

In the year that has passed, the VVV's have amply demonstrated their loyalty and devotion to their country and to their fellow Americans by their cheerful and enthusiastic performance of the duties entrusted to them. They are rendering a valuable and honorable service which is all the more difficult because it lacks the glamor and excitement of combat.

Because of the sacrifices made and the high spirit maintained in the performance of their every day tasks, the VVV's have made many friends and have provided a shining example for all of us. I know they will carry on with constantly improving efficiency and the same high morale until the war is won.

Good luck VVV's!

Sincerely yours,

Signed: L. A. HICKS

Petitioner's Exhibit S—(Continued)

January 30, 1943

To: All Members of the Varsity Victory Volunteers

Approximately a year ago I had the rare opportunity of becoming associated with you all in the capacity of being your Commanding Officer. With this assignment, came the responsibility of your conduct and behavior, performance and actions as well as the remunerations for your voluntary services. During this short span of one year, I've had daily contacts with all of you and can truly say that you have more than demonstrated your loyalty, love and devotion to your country, the United States of America.

You have met a challenge, your achievements no doubt have ultimately resulted in a very recent change in policy by the War Department towards all Americans of Japanese descent illuminating their outlook by enormous proportions. It is my great pleasure to congratulate you.

Now we have reached a point where the armed forces have a more urgent need for your voluntary services. This is essential in bringing forth a speedier victory for our United Nations.

On the occasion of the inactivation of your organization, the Varsity Victory Volunteers, after which all of you will make an important decision, it is my chief desire that you shall have a free course and full support in your embarkation. The

Petitioner's Exhibit S—(Continued)

"rudder" is in your charge—God Speed the Ship!

ALOHA AND GOOD LUCK.

RICHARD T. F. LUM
Captain 34th Engineers
A.P.O. 957

After more than 11 months of service with the Army Engineers the Varsity Victory Volunteers were inactivated on January 31, 1943.

The demobilization was requested by members of the VVV who asked to be released in order that they may enlist for service in the United States Army with the American-Japanese combat unit.

In Appreciation for Their Contribution

For their written material:

Shiro Amioka
Herbert Isonaga
Grover Nagaji
Shosc Kagawa
Walter Goto
Katsumasa Tomita
Ted Tsukiyama
Henry Oyasato
Wilfred Mita
Shigemitsu Nakashima
Kaname Takemoto

Petitioner's Exhibit S—(Continued)

For the use of their snapshots:
Calvin Tottori
Clarence Hamaishi
Roy Kobayashi
Ted Tsukiyama
The Honolulu Advertiser
John Onodera
Walter Iwasa
Henry Oyasato
Katsumasa Tomita
The Hawaii Times

For typing and proofreading:
Edward Okazaki
Wilfred Mita
Allen Yamada
Shigemitsu Nakashima

For page make-up and lay-out:
Junichi Buto

For printing and publishing:
Tongg Publishing Company
YUTAKA NAKAHATA
The Editor

[Endorsed]: Filed 4-11-44.

The Court: That blue book there, I don't know whether you intended to offer that in evidence or not.

Mr. Anthony: I don't think it is necessary to encumber the record with that, your Honor.

The Court: All right.

Mr. Anthony: I have a number of statements from military and naval commanders which I would like to offer in evidence. I understand there is no objection, if the Court please. The first is a statement by Admiral Nimitz on March 10, 1943, and on the same sheet there is a statement of a press interview between General Emmons and Frank H. Bartholomew. That is dated January 1, 1943. In the latter statement General Emmons is quoted as saying:

> "The fortress of Oahu is, Gen. Emmons said, now able, in conjunction with the Navy to defend Hawaii against any invasion attempt the Japanese at this time are likely able to muster." [724]

May that be received your Honor?

The Court: Well, you have several of those?

Mr. Anthony: Yes, I have four of them.

The Court: Why not offer them together as 1, 2, 3 and 4?

Mr. Anthony: The second one appears in the Star-Bulletin of December 7, 1943, and contains a quotation from Admiral Nimitz, and also on the same page an item appearing in the Star-Bulletin of June 7, 1943, containing a quotation from Admiral Nimitz, in regard to the attack upon the Japanese.

The Court: What is the quotation?

Mr. Anthony: The Admiral said:

> "Our time has come to attack .... The Jap has dug himself in. We must land and dig him out."

In the second one the Admiral says:

> "'The Japs are now on the defensive. . . . time is working for us now.'" "Admiral Nimitz warned 'we must do everything in our power to aid China because we must use bases in China to attack Japan . . . We are turning out planes and ships faster than Japan can. It's simple arithmetic—subtraction for them and addition for us.'"

In the same article the Admiral pointed out, cautioned, that

> "'. . . the Japanese are still capable of doing great damage.'"

Also, I have two quotations, one from the Star-Bulletin of January 27, 1944, and the other from the Advertiser of January 19, 1944, both from Admiral Carney, Chief of Staff in the South Pacific. The Admiral is quoted as saying:

> "'He (the Jap) knows his number is up. We have proved we can hit him exactly when and where we want. By coordinating our forces, air and sea, we will blockade New Britain and New Ireland forces—which may total 100,000 men.'" [725]

And in the quotation of January 27, 1944, this Admiral says:

> "'It is perfectly evident to everyone that the South Pacific and Southwest Pacific forces are pushing along toward eliminating those bases. They are next on the list.'"—referring to Rabaul and Kavieng.

I would also like to offer in evidence a statement by the Undersecretary of War, appearing in the Honolulu Advertiser of February 4, 1944. The Under Secretary is quoted as saying:

"'Occupation of the Marshalls will widen the crack in Japan's outer defense ring. When it is completed it will shorten the line of supply and communications with the Southwest and South Pacific and make it possible for us to deploy our forces so they can attack the inner defenses of enemy territory. The crack in the outer defense wall may become the breach through which we can advance to the Philippines or Tokyo.'"

"'As we advance in the Pacific we will secure our western defenses. These islands will provide a defense barrier 2,000 miles to the west of the former outer defense of Hawaii.'"

The Court: They may be received in evidence as Exhibits "T", 1, 2, 3, and 4.

(Petitioner's Exhibits "T-1, T-2, T-3, T-4 received in evidence.)

PETITIONER'S EXHIBIT T-1

Nimitz In Tribute To Isle Citizens

(Following is the text of an address given by Admiral Chester W. Nimitz commander in chief of the Pacific fleet and Pacific ocean area, during ceremonies in the legislature at 10 this morning on the occasion of restoration of civil rights to Hawaii.)

It is a distinct privilege to have this opportunity of expressing to the citizens of this community, through their legislative representatives, my admiration and appreciation of their cooperation and participation with the military and naval authorities in the war effort to date.

It is true that such cooperation and acceptance of military government has not been without considerable personal inconveniences and curtailment of the normal way of life, but I am pleased to observe that such deprivations have been cheerfully met.

The selection of Gen. Emmons as the military governor was a fortunate choice.

* * *

I am sure that the harmonious relations which have existed can be attributed equally to his wise administration and to the hearty cooperation of the citizens.

I am confident that the same harmonious relations will continue under the new arrangement which becomes effective today.

During the past year this citadel in the Pacific has been greatly strengthened, which is in keeping with its importance.

However, in spite of this defensive strengthening and in spite of our success against the enemy, he still has the capacity to attempt a destructive raid against our installations should he be willing to accept the risk.

For this reason it is unwise to relax our precautions, which include the blackout.

* * *

On behalf of the officers and men of the various services in this area I thank the citizens of this community for their friendly courtesy and traditional hospitality which has played an important part in the maintenance of high morale.

Star-Bulletin

Hawaii Now Safe Against
Invasion, Says Gen. Emmons
By Frank H. Bartholomew

(Note: Mr. Bartholomew is vice president and Pacific division manager of the United Press Associations, one of the world's two greatest news gathering and distributing organizations. He is in Honolulu on a mission of inspection of U. P. facilities and operations.)

[Stamped] Jan. 1, 1943

Honolulu, Jan. 1. (UP)—Hawaii, safe today under the protecting guns of one of the greatest fortresses on earth against any invasion the Japanese currently may be able to organize, is being steadily strengthened against a possible climactic battle within the next few years, Lt. Gen. Delos C. Emmons, commander of the Hawaiian department, told the United Press last night.

Gen. Emmons, 54 year old West Virginian, is the man who in a short year's time since inheriting the wreckage of the army's air installations at Hickam, Wheeler and Bellows fields, has converted the island of Oahu into what probably is the strongest fortified point on the globe, and certainly the newest and most modern militarily.

This correspondent, permitted to tour certain of the island's new defense installations which may not be reported detailedly, observed engineering and construction feats completed or well underway on a three shift basis which border on the miraculous in ingeniuty, magnitude and speed of construction.

Engineer officers said Gen. Emmons himself was the spark plug of the job in the field as well as in guarded offices where the original plans were worked out.

Gen. Emmons and his car are all over the island of Oahu. He wants to see everything himself at first hand. Each project and unit is frequently checked and improvements ordered as opportunities occur.

Progress Noted

"We are well along on new military installations," Gen. Emmons said. "Almost all the requirements of the airforce, sea coast artillery, field artillery, infantry and service of supply should be finished shortly.

"We have quite a little farther to go with housing for troops all over the island; that job now is about half done. Men currently housed in shacks and plantation buildings which we took over and in tents will be supplied with modern field housing.

"After that, we have the job of rebuilding Hawaii's public roads which our heavy equipment is punishing severely in the present high speed construction work. We require our 18-ton dump trucks

to maintain a speed of 35 miles an hour, quite a workout for roadways as well as equipment.

"Concurrently, there will be an enlargement and improvement of Honolulu's port facilities to accommodate more shipping and speed up handling of cargo."

The fortress of Oahu is, Gen. Emmons said, now able, in conjunction with the navy, to defend Hawaii against any invasion attempt the Japanese at this time are likely able to muster.

The possibility of a hit and run raid is excepted, since this sort of foray may be tried any time the enemy is willing to pay the price which would be high.

"The strategic importance of Oahu for the west coasts of North and Central America and the Panama canal is very great and both sides are well aware of it," Gen. Emmons said. "In order to get at the mainland, the Japanese must first capture the Hawaiian islands, and in order to do that, they must first take Oahu.

"So we are building here for an eventual showdown battle with the Japanese, if in the years to come they are able to mass a force sufficient for an invasion attempt. We are building well because this island must and will be held at all costs."

Japanese Losses Noted

Commenting on the quality of enemy aviation, Gen. Emmons noted that the loss of at least 2,000 Japanese naval fliers materially reduced the efficiency of the enemy's fleet air arm; that the recent increase in flying performance of the enemy in

some areas indicated he has been forced to draw from the army air corps to replace lost naval fliers and planes.

Thus far, Gen. Emmons said, the Japanese army air corps has been principally concerned with defense of Japan and Manchuria.

"Right now, the Japs seem primarily interested in building up a strong outpost line, consolidating gains throughout the Orient and Dutch Indies, and working on development and transport of oil and rubber supplies they have gained," the general said. "Fortunately, they keep coming out of their protective shell to offer us targets in the south and southwest Pacific, and each time such an invitation is extended, our navy has accepted with alacrity and splendid results.

"The navy has closed with the enemy on every possible occasion. In continuous pressure against Jap supply lines, it is estimated that we have sunk enough shipping to seriously cramp enemy activities.

"The army, too, reaches out for a crack against the Jap whenever the opportunity offers, and past events have proven it has done so with great success."

Airfields Developed

In connection with long range bombing, current and future, he said Hawaiian airfields are being developed with an eye to still larger planes which will be delivered to the bomber command in the years to come.

"We will carry the war to Japan," Gen. Emmons concluded. "It will take time, but it will be done

and in sufficient force. We are aware of our vital responsibilities to the territory and to the United States mainland on both offense and defense."

Star-Bulletin

[Endorsed]: Filed 4-11-44.

PETITIONER'S EXHIBIT T-2

Nimitz Sees Different Pearl Harbor Picture

By Charles McMurtry

[Stamped]: Dec. 7, 1943.

Pearl Harbor, Dec. 7. (AP)—Admiral Chester W. Nimitz, sat quietly alone in his office overlooking Pearl Harbor today, awaiting additional reports of the navy's latest strikes in the Marshall islands.

The commander in chief of the Pacific fleet appeared calm—as always—but time must have passed slowly. Carrier task forces, such as sent scores of planes raining bombs on Japanese strongly held central Pacific bases, can not break radio silence in danger zones, even to inform their admiral of their successes.

Nothing more yet has been made public than yesterday's brief communique stating only that the Marshalls were raided. That virtually is all the admiral himself knew.

But Admiral Nimitz could sit back between necessary interruptions by staff members and visualize the great force of carriers and escorting warships he had sent to bombard the Marshalls.

From his bomb-proof headquarters constructed since Pearl Harbor, he had seen most, if not all, of those ships pass within his view in recent months. Most of them also were built since Pearl Harbor and probably all of them participated in the recent raid on Marcus, Nauru, Tarawa, Wake and in the assault and capture of the Gilberts less than three weeks ago.

They were carrying out his Armistice Day declaration, "Our time has come to attack . . . The Jap has dug himself in. We must land and dig him out."

The admiral could look out over the harbor and see evidence of the navy's growing strength. Whether he could see the ships, of course, is censorable. But there were other evidences of increasing power—repair and construction facilities—mushrooming workshops, barracks and many more, all unreportable.

Two years ago anyone looking over the harbor could see only the wreckage of warships, destroyers and other craft destroyed and damaged by the Japanese attack.

Huge clouds of black smoke from oil fires rose from the harbor. Nearby at Hickam field and John Rodgers airport wrecked planes strewed the runway. Hangars and barracks were damaged by bombs.

Other installations over the island of Oahu similarly showed evidences of the attack. Wounded overflowed hospitals, emergency wards, the armory and other buildings.

Today the picture looked bright, with the United States on the offensive.

Lt. Gen. Robert C. Richardson Jr., commanding general, central Pacific, recently warned another sneak attack is possible. Confidence prevails, however, it would be repulsed without too great damage, if it should come.—Star-Bulletin.

Nimitz Planning Blows In Pacific

[Stamped]: Jun 7 1943

Berkeley, Cal., June 7. (AP)—The Pacific fleet is being steadily reinforced and will reach formidable proportions by the end of this year, said Admiral Chester W. Nimitz, commander in chief of the Pacific fleet, who is on the mainland to confer on new offensive moves against the Japanese. Admiral Nimitz disclosed his presence on the mainland Sunday in a surprise appearance at the University of California commencement exercises at which he was awarded an honorary LL.D. degree.

Speaking to the university alumni Admiral Nimitz explained "much as I desire to be here I couldn't have left my post unless I had a job to do. I'm happy commencement day coincided with the conference which I am called to attend—a conference which isn't particularly solicitous as to the welfare of Hirohito and which I hope will carry trouble to the Japanese."

He didn't amplify his statement.

The admiral denied supplies for the Pacific war were being neglected, announcing "by the end of

the year our planes and ships in the Pacific will represent a very formidable force. We really are getting our share of war material."

Although he asserted the Japanese are on the defensive and "time is working for us now," Admiral Nimitz warned "we must do everything in our power to aid China because we must use bases in China to attack Japan. . . . We are turning out planes and ships faster than Japan can. It's simple arithmetic—subtraction for them and addition for us."

He pointed out that Japan has made no serious threat to the Pacific coast since Midway a year ago but cautioned the Japanese "are still capable of doing great damage."—Star-Bulletin.

[Endorsed]: Filed 4-11-44.

PETITIONER'S EXHIBIT T-3

New Type of U. S. Offensive Is Promised!

Nauru Won't Stay Japanese Long, Says Halsey Staff Chief

By Frank Tremaine

Headquarters, South Pacific Force, Jan. 27. (U.P.)—Rabaul and Kavieng, with their estimated 100,000 men—next Japanese bases on the United States' list in the south Pacific—will be eliminated with something new from Admiral William F. Halsey's bag of offensive tricks, Rear Admiral Robert

B. Carney, south Pacific chief of staff, indicated today.

Almiral Carney also hinted that the Japanese will not be permitted to occupy Nauru island for long. Nauru is the enemy's only useable base between the south Pacific and central Pacific areas.

Aggressive, energetic Admiral Carney, whose balding head belies his youthfulness, pointed out that Bougainville and Buka are already useless to the Japanese and that United States planes and carriers have proved they can hit the enemy at Rabaul "any damn time we want."

"The next two obvious points of Japanese strength are Rabaul and Kavieng," Admiral Carney said.

* * *

"It is perfectly evident to everyone that the south Pacific and southwest Pacific forces are pushing along toward eliminating those bases. They are next on the list.

"We plan to put them out of business.

"But just how we will do it will be something the enemy least expects. It won't be in accordance with any familiar pattern."

Admiral Carney said that aerial observation of Rabaul and Kavieng indicates that the Japanese already have lost all confidence in their ability to use them for anything of great value.

* * *

"He knows his number is up," the admiral said. "We have proved we can hit him exactly when and where we want. By coordinating our forces, air

and sea, we will blockade New Britain and New Ireland forces—which may total 100,000 men.—Star-Bulletin, 1-27-44

100,000 Japs Face Annihilation In New South Pacific Moves

By Frank Tremaine
(United Press Staff Correspondent)

South Pacific Headquarters, Jan. 18—New tactics from Admiral William F. Halsey, bag of tricks will be used to "eliminate" Rabaul in New Britain and Kavieng in New Ireland and with them 100,000 Japs, Rear Admiral Robert Carney, South Pacific chief of staff, predicted tonight.

Carney pointed out that Bougainville and Buka already are useless to the Japs, and said offensives against Rabaul and Kavieng—"the next Jap base on the U. S. list"—would put them "out of business, but just how, we'll do it will be something the enemy least expects. It won't be in accordance with any familiar pattern."

Japs Know Number Is Up

Carney said air observation of Rabaul and Kavieng indicates the Japs already have lost all confidence in their ability to use them for anything of great value.

"The Jap knows his number is up," Carney said. "We've proved we can hit him exactly when and where we want. By coordinating our forces in the air and at sea, we will blockade New Britain and New Ireland and their forces, which may run above 100,000 men."

Carney also indicated Nauru may soon be wrested from the Japanese. Referring to the South Pacific and Central Pacific offensives, which spread an arc from the Gilberts to the Solomons, Carney said:

"The Jap still holds Nauru, and it is illogical to expect us to permit him to occupy this salient much longer."—Advertiser 1-19-44

[Endorsed]: Filed 4-11-44.

PETITIONER'S EXHIBIT T-4

U.S. Casualties In Invasion Of Marshalls Held Moderate

By Sandor S. Klein

(United Press Staff Correspondent)

Washington, Feb. 3—American forces in the Marshall Islands are meeting heavy resistance, but the casualties thus far have been moderate, Undersecretary of War Robert Patterson said today.

"Fighting is continuing," Patterson told a press conference.

"Our troops are making excellent progress. Preliminary reports show fine coordination between land, sea and air forces—which is the outstanding characteristic of our amphibious operations."

Positions Secure

Patterson said that the position of marine forces on Roi and Namur islands now appeared to be secure while the 7th Army division was proceeding

with the occupation of Kwajalein.

"Occupation of the Marshalls will widen the crack in Japan's outer defense ring," he said. "When it is completed it will shorten the line of supply and communications with the Southwest and South Pacific and make it possible for us to deploy our forces so they can attack the inner defenses of enemy territory.

"The crack in the outer defense wall may become the breach through which we can advance to the Philippines or Tokyo."

Patterson said that invasion details were still awaited in Washington.

Fleet Not Challenged

He noted that the Japanese had not yet challenged the U. S. fleet, although they had plenty of opportunity to do so.

He ponted out that in attacking Kwajalein atoll United States forces bypassed Wotje, Maloelap, Mille and Jaluit just as Kiska was bypassed when Attu was occupied.

"As we advance in the Pacific we will secure our western defenses," he said. "These islands will provide a defense barrier 2,000 miles to the west of the former outer defense of Hawaii."—Advertiser, 2-4-44

[Endorsed]: Filed 4-11-44.

Mr. Anthony: In response to my inquiry, if the Court please, in regard to the Japanese that are employed in this Territory and the Japanese that are in the Armed Forces, Counsel has furnished me a memorandum which does not give the number of casualties among the Japanese American of Japanese ancestry; it does give the number of persons in the Armed Services and the number of Japanese who are employed in Army reservations. Does your Honor want to hear what the numbers are?

The Court: Yes. [726]

Mr. Anthony: The reported figure is as follows: The number of Japanese employed on military reservations, including installations, military and naval projects, Territory of Hawaii, including U.S.E.D. employees—there is A.E.T.C.——

The Court: What does U.S.E.D. mean?

Mr. Anthony: United States Engineers. They are the fellows out at Punahou, your Honor. United States Engineers Department, Army projects.

The Court: Is that a department of the Army?

Mr. Ennis: Yes, your Honor, they are a part of the War Department.

The Court: A department within a department?

Mr. Ennis: Well, yes, your Honor, that is correct.

The Court: I asked because it was a new term to me. Is it the same as the Engineer Corps of the Army?

Mr. Ennis: I'm sorry, your Honor,——

Mr. Anthony: Well, there are two outfits, one is a Corps of Engineers and the other is the

U.S.E.D. We ought to have somebody in this room that can tell us the difference. And then there is a District Engineer that has an office out in Shafter.

The Court: Well, that's a part of the Engineer Corps.

Mr. Anthony: Well, anyhow, the figure is 27,497.

The Court: Twenty-seven thousand?

Mr. Anthony: That are persons of Japanese ancestry working on Army reservations, military reservations. I am told by Counsel that that includes those that are working in the military hospitals. [727] Is that not correct?

Mr. Ennis: Yes, I am so advised.

Mr. Anthony: The breakdown is: American citizens of Japanese ancestry, 6,778; aliens, 743. I got this wrong, your Honor. The first figure, 27,497 is the total number of employees, civilian employees of all the nationalities. The next figure, American citizens of Japanese ancestry, 6,778; aliens, 743.

The Court: Alien Japanese?

Mr. Anthony: Alien Japanese. Then in the Navy, the total number of employees is 2,000; American citizens of Japanese ancestry, 585; and aliens, none. I understand that the 2,000 Japanese that work on Navy projects do not work in the Navy Yard. This memorandum is very confusing, your Honor. Two thousand is the total number of employees. I thought they meant Japanese. That is why I asked about it. The figure 585 is the num-

ber of Japanese out of the 2,000. They are not employed in the Navy Yard.

The Court: They are not?

Mr. Anthony: They are not. They are employed by the Byrne Construction Company. That is one of the prime contractors for the U. S. Navy.

The Court: You mean there are no Japanese, Americans of Japanese ancestry employed in the Navy Yard?

Mr. Anthony: I don't think they allow them in there. I am not sure.

Mr. Ennis: Yes, I am so advised.

Mr. Anthony: I don't think they allow Japanese in the Navy [728] Yard.

The Court: How long has that been in effect?

Mr. Ennis: We have inquired, your Honor, from the Director of Personnel for the Navy, and he advises us that there are no civilian Japanese employed in the Navy Yard. Now, if it is important, your Honor, as to whether that is a recent rule or not, I will find out.

The Court: I merely knew of my own experience, having been in there since the beginning of war, at the Pearl Harbor Navy Yard, and I saw a number of Japanese, presumably citizens, presumably citizens of Japanese parents.

Mr. Ennis: Well, your Honor, all the information that I have available right now is that which has been stated, but I will check a little further.

The Court: I don't know that that is of importance to the case.

Mr. Anthony: We offer the memorandum in

evidence, your Honor. Counsel has not produced the number of casualties, and I think if there is anything at all in this business of dual citizenship —which I submit is wholly without any relevance to the issues in this case—but if we are going into it, let's find out how many of these Japanese are actually dead, how many are actually wounded, how many are in Hawaii. It's a simple matter. They can send word to the War Department.

Mr. Ennis: As indicated here, there are no current figures in the Territory, and we'd be glad to go further and see what [729] figures we can get from the War Department in Washington.

The Court: Well, I can't see where that is material in any respect to the case.

Mr. Anthony: The whole business is immaterial. It's all a lot of nonsense as far as I can make out. But we have been obliged to address ourselves to something that has nothing to do with this case. And I say if we are going to do it, let's do the job correctly.

Mr. Ennis: I think it is a matter of public notice in the press that there have been a substantial number of casualties, and——

The Court: Well, I feel quite sure that the case isn't going to be resolved on matters of that kind.

Mr. Anthony: Very well, I'll withdraw my request.

The Court: Exhibit "U" is received in evidence.

(Petitioner's Exhibit "U" was received in evidence.)

PETITIONER'S EXHIBIT U

Honolulu, T. H.
10 April 1944

Memorandum to Colonel Wm. R. C. Morrison

Subject: Information requested by Court and Opposing Counsel relative to Japanese.

1. Actual Number of American Citizens of Japanese Ancestry Now in the United States Army Who Were Inducted or Volunteered in the Territory of Hawaii.

Lt. Col. Henry Best, Deputy Director of Selective Service, advised that there were now 5,226 citizens of Japanese ancestry serving in the United States Army who were inducted or volunteered during the period commencing December 1940 and extending up to the present date.

2. Actual Number of Casualties in American Citizens of Japanese Ancestry Serving With American Forces Who Were Inducted or Volunteered From the Territory of Hawaii.

Selective Service officials and Military Intelligence officials state that although several of the AJAs have been killed in action in Italy, the exact number is not available at the present time in the Territory of Hawaii.

3. Total Number of Japanese Evacuated from the Territory of Hawaii from December 7, 1941 to the Present Date.

1,747. (This figure can be broken down to show AJAs, Aliens and families of these two groups).

4. Total Number of Japanese Interned in the Territory of Hawaii from December 7, 1941 to the Present Date.

1,396. (This figure can be broken down as to Japanese Aliens and citizens of Japanese ancestry, if desired).

5. Total Number of Japanese Interned During the First Quarter of 1944.

96. Total number interned during March, 1944—41. (These figures can be broken down as to Aliens and American citizens of Japanese ancestry, if desired.)

6. Total Number of Internee Cases, That Is the Total Number of Japanese of All Classes Which Have Been Considered for Custodial Detention, Investigated or Otherwise Handled by the Military Intelligence Agencies in This Area.

50,000.

7. Were Citizens of Japanese Ancestry Who Volunteered Recently for Military Service Asked Question of Whether They Were Dual Citizens?

Lt. Col. Henry Best, Deputy Director of Selective Service states that all of the volunteers in this group executed Form 304-A Revised which included, among other questions, the following:

> "25. To the best of your knowledge, was your birth ever registered with any Japanese governmental agency for the purpose of establishing a claim to Japanese citizenship?.....
>
> .....
>
> "(a) If so registered, have you applied for

cancellation of such registration? (Expatriation) ..... Yes or No. .....
When? ..... Where? .....

(Col. Best also advised that no statistics were kept relative to the number of volunteers that were dual citizens and to obtain this information it will be necessary to pull all of the individual files located in the several local boards throughout the Territory.)

8. Ascertain Full Facts Relative to Actual Work Assigned to Petitioner Lloyd C. Duncan Subsequent to His Incarceration in the City and County Jail.

Lieut. Jules Sachson, 810th M.P. Company, Immigration Station, Honolulu, T.H., stated that he was in charge of the prisoners that were sent to the 810th M.P. Company from the City and County Jail. That they were assigned work under his supervision. He stated that Lloyd C. Duncan first appeared on the Company's records on March 3, 1944 and was assigned to work in the Supply Room; that he worked in the Supply Room from the 3d of March through the 13th of March; that the Company's records did not show that Duncan was working at the 810th M.P. Company on the 14th of March. He stated, however, that on this day he had sent 4 other Provost Court prisoners to Kaneohe to work on a cesspool project which had been previously commenced by the Army.

He stated that on the 15th of March Duncan was sent to Kaneohe along with a work detail and that his sergeant advised him that Duncan refused to go

into the hole and work and was given other work near that project. That Duncan returned to Kaneohe on the 17th and 18th of March 1944. That Duncan worked around the 810th P.M. Company on Sunday, March 19, and that on Monday, March 20, he was not sent down by the City and County Jail officials for work.

Further that Duncan worked on the 21st, 22nd, 23rd, and 24th around the 810th M.P. Company at the Immigration Station. That on the 25th of March 1944, he was sent back to Kaneohe; that on the 26th of March he worked at the 810th M.P. Company, Immigration Station, Honolulu. That on March 27th and 28th he worked at Kaneohe on the cesspool project, and on the 29th and 30th Duncan worked at the Halekai Officers' Club at Waikiki.

That his records did not show that Duncan worked under his supervision any time subsequent to March 30, 1944.

Lieut. Sachson stated that he did not know the petitioner in this case and certainly did not know he had filed application for a Writ of Habeas Corpus; furth. r, that Duncan was assigned along with other prisoners to the work that had to be done and was not discriminated against in any manner. Lt. Sachson stated that when the prisoners come down from the City and County Jail, that he is not advised whether or not they will do hard labor or light work; that his only instructions were to put them to work.

9. The Number of Japanese Employed on Military Reservations, Installations and Military and

Naval Projects, Territory of Hawaii, Including Used Employees, Etc.

Army projects—total number of employees	27,497
American citizens of Japanese ancestry	6,778
Aliens of Japanese ancestry	743

(These figures may be slightly off, but they are the best estimate that could be obtained on such short notice)

Navy projects—Byrne Construction Company (Handles construction for United States Navy outside of Pearl Harbor proper)

Total number of employees	2,000
Amer. citizens of Japanese ancestry	585
Aliens of Japanese ancestry	none

ANGUS M. TAYLOR, JR.
1st Lieut., CAC.

[Endorsed]: Filed 4-11-44.

Mr. Ennis: If the Court please, I offer in evidence, without objection of opposing Counsel, a copy of the official report of the Navy Department of December 4, rather December 5, 1942, on the damage done at Pearl Harbor on December 7, 1941, and 34 photographs of that damage taken from the files of the Navy Department.

The Court: Has that got anything to do with the so-called Roberts' Report?

Mr. Ennis: Well, your Honor, the Roberts' Report——

The Court: It follows the same figures?

Mr. Ennis: Yes, but it adds this, your Honor, that the [730] Roberts' Report was published considerably before this and before the Government felt that it could release the information as to the extent of the damage. And, therefore, the Roberts' Report did not contain the extent of the damage because it was published just a few months after the actual attack and before we knew or were sure that the Japanese had all the information. Finally, the extent of the damage was explained in this report a year after the attack.

Now, the purpose of this, your Honor, is to show the character of an attack which can be made on that installation and the extent of an attack which the military authorities feel must be protected against.

The Court: Well, if there is no objection, you may put it in evidence, but so far as I can see it doesn't have any bearing on the case. Hearing no objection, it is received in evidence as Exhibit 14.

(Respondent's Exhibit "No. 14" was received in evidence.)

RESPONDENT'S EXHIBIT No. 14

THE NAVY'S REPORT ON PEARL HARBOR

Washington, Dec. 5 (U.P.)—Following is text of the Navy department's report on Pearl Harbor:

1. On the morning of Dec. 7, 1941, Japanese aircraft temporarily disabled every battleship and most

of the aircraft in the Hawaiian area. Other naval vessels, both combatant and auxiliary, were out of action and certain shore facilities at the army air bases at Hickam and Wheeler Fields and at the naval air stations at Ford Island and Kaneohe Bay were damaged. The aircraft were all replaced within a few days and interference with facilities generally was limited to a matter of hours.

2. When the Japanese attacked Pearl Harbor, two surface ship task forces of the Pacific Fleet were carrying out assigned missions at sea and two such task forces were at the main base following extensive operations at sea. Discounting small craft, 86 ships of the Pacific fleet were moored in Pearl Harbor. Included were eight battleships, seven cruisers, 28 destroyers and five submarines. No United States aircraft carriers were present.

Five Battleships Disabled

3. As a result of the Japanese attack, five battleships—the Arizona, Oklahoma, California, Nevada and West Virginia—and three destroyers—the Shaw, Cassin and Downes—the minelayer Oglala, the target ship Utah and a large floating drydock either were sunk or damaged so severely that they would serve no military purposes for some time. In addition, three battleships—the Pennsylvania, Maryland and Tennessee—three cruisers—the Helena, Honolulu and Raleigh—the seaplane carrier Curtiss and the repair ship Vestal were damaged.

4. Of the 19 naval vessels listed above as sunk or damaged, the 26 year old battleship Arizona will be the only one permanently and totally lost. Prep-

arations for righting the Oklahoma now are in process, although a final decision as to the wisdom of accomplishing this work at this time has not been made.

Salvage, Repair 15 Ships

Main and auxiliary machinery of approximately 15 percent of the value of the Cassin and Downes was saved. The other 15 vessels either have been or will be salvaged and repaired.

The eight vessels described in the second sentence of paragraph three returned to the fleet months ago. A number of the vessels described in the first sentence of paragraph three now are in full service, but certain others which required extensive machinery and intricate electrical overhauling as well as refloating and hull repairing are not yet ready for battle action. Naval repair yards are taking advantage of these inherent delays to install numerous modern features of improvement.

To designate these vessels by name now would give the enemy information vital to his war plans. Similar information regarding enemy ships which our forces subsequently damaged but did not destroy is denied to us.

On Dec. 15, only eight days after the Japanese attack and at a time when there was an immediate possibility of the enemy's coming back the Secretary of the Navy announced that the Arizona, Shaw, Cassin, Downes, Utah, and Oglala had been lost, the Oklahoma capsized and other vessels damaged.

Repairs Exceeded Hopes

Fortunately, salvage and repair accomplishments at Pearl Harbor exceeded the most hopeful expectations.

Eighty naval aircraft of all types were destroyed by the enemy. In addition, the army lost 97 planes at Hickam and Wheeler Fields. Of these, 23 were bombers, 66 were fighters and eight were other types.

The most serious American losses were in personnel. As a result of the raid on Dec. 7, 2,117 officers and enlisted men of the Navy and Marine Corps were killed, 960 still are reported missing and 876 were wounded but survived. Army casualties were as follows: 226 officers and enlisted men killed or later died of wounds, 396 wounded, most of whom now have recovered and returned to duty.

At 7:55 a.m. Dec. 7, Japanese dive-bombers swarmed over the Army air base at Hickam Field and the Naval air station on Ford Island. A few minutes earlier, the Japanese had struck at the Naval air station at Kaneohe Bay. Bare seconds later, enemy torpedo planes and dive-bombers swung in from various sectors to concentrate an attack on heavy ships in Pearl Harbor.

Attack Based on Exact Data

The enemy attack, aided by the element of surprise and based on exact information, was very successful. Torpedo planes, assisted effectively by dive-bombers, constituted the major threat in the first phase of the Japanese attack, lasting approximately half an hour. Twenty-one torpedo planes made four attacks and 30 dive-bombers came in eight waves during the period. Fifteen horizontal

bombers also participated in this phase of the raid.

Although the Japanese launched their initial attack as a surprise, the battleships were ready and machineguns opened fire at once and were progressively augmented by remaining antiaircraft batteries as all hands promptly were called to general quarters. Machine guns brought down two and damaged others in the first wave of torpedo planes. Practically all battleship antiaircraft batteries were firing within five minutes, cruisers within an average time of four minutes and destroyers, opening up with their machine guns almost immediately, averaged seven minutes in bringing all antiaircraft guns into action.

From 8:25 to 8:40 a.m., there was a comparative lull in the raid, although air activity continued with sporadic attacks by dive and horizontal bombers. This respite was terminated by the appearance of horizontal bombers which crossed and recrossed their targets from various directions and caused serious damage.

Dive-Bombers Return

While the horizontal bombers were continuing their raids, Japanese dive-bombers reappeared, probably being the same ones that participated in the earlier attacks. This phase, lasting about half an hour, was devoted largely to strafing. All enemy aircraft retired by 9:45 a.m.

Prior to the Japanese attack there were 202 U. S. naval aircraft of all types on the island of Oahu in flying condition, buf 150 of these were permanently

or temporarily disabled by the enemy's concentrated assault, most of them in the first few minutes of the raid. Of the 52 remaining naval aircraft, 38 took to the air on Dec. 7, the other 14 being ready too late in the day or being blocked from take-off positions.

Of necessity, the Navy was compelled to depend on antiaircraft fire for its primary defensive weapon and this condition exposed the fleet to continuous air attack.

By coincidence, 18 scout bombing planes from a U. S. aircraft carrier were en route and arrived at Pearl Harbor during the raid. These were included in the foregoing figures. Four of these scout bombers were shot down, 13 of the remaining 14 taking off again in search of the enemy. Seven patrol planes were in the air when the attack started.

There was a total of 273 army planes on the Island of Oahu on Dec. 7. Very few of these were able to take off because of damage to runways at Hickam and Wheeler Fields.

It was difficult to determine the total number of enemy aircraft participating in the raid, but a careful analysis of all reports makes it possible to estimate the number as 21 torpedo planes, 48 dive-bombers and 36 horizontal bombers, totalling 105 planes of all types. Undoubtly certain fighter planes also were present, but these were not distinguished by types and are included in the above figures.

Japs Lost 48 Planes

The enemy lost 28 aircraft due to Navy action, and the few Army pursuit planes that were able to take off shot down more than 20 Japanese planes. In addition, three submarines of 45 tons each were accounted for.

Damage suffered by the U. S. Pacific Fleet as a result of the Japanese attach on Dec. 7 was most serious, but the repair job now has been nearly completed and thanks to the inspired and unceasing efforts of naval and civilian personnel attached to various repair yards, especially at Pearl Harbor itself; this initial handicap soon will be erased forever.

[Endorsed]: Filed 4-11-44.

Mr. Ennis: I have one more. I offer in evidence as Respondent's Exhibit 15 a memorandum dated April 10, 1944, stating the number of persons of Japanese ancestry interned in the Territory from December 7, 1941, to April 10, 1944, broken down into aliens, dual citizens, and U. S. citizens.

The Court: What are the figures?

Mr. Ennis: The total figure is 1,396.

The Court: I was asking for a description. No. 14, what do you call that? What should it be designated as in the record [731] of exhibits?

Mr. Ennis: This memorandum?

The Court: No, Exhibit 14, the one relating to damage.

Mr. Ennis: Well, it is the copy of the official report of the Navy Department on the damage at Pearl Harbor.

The Court: What is the date of it?

Mr. Ennis: December 5, 1942.

The Court: Is it signed or authenticated by anyone?

Mr. Ennis: No, it was used as a press release of the Navy Department, your Honor.

The Court: All right.

(Respondent's Exhibit "No. 15" was received in evidence.)

RESPONDENT'S EXHIBIT No. 15

Confidential
Headquarters United States Army Forces
Central Pacific Area
Office of the Assistant Chief of Staff
for Military Intelligence
Counter Intelligence Division
Box 3, APO 456

In reply refer to:

10 April 1944

MEMORANDUM FOR THE OFFICE OF THE MILITARY GOVERNOR:

Subject: Japanese Internment

The following data are from the official files of this office:

a. Number of Japanese Interned, Territory of Hawaii, from 7 December 1941, to 10 April 1944..... 1,396

Aliens	Dual Citizens	American Citizens
857	504	35

(1) Released or Paroled 217

Aliens	Dual Citizens	American Citizens
137	60	20

(2) Relocated on Mainland 313

Aliens	Dual Citizens	American Citizens
7	300	6

(3) Repatriated to Japan (All Aliens)..... 70
(4) Deceased (All Aliens) 10

610

(5) Remainder in Custody 786

	Aliens	Dual Citizens	American Citizens
On Mainland	597	—	—
In Territory	36	144	9

BYRON M. MEURLOTT
Major, M. I.,
Assistant A. C. of S., G-2 (CID)
Confidential

[Endorsed]: Filed 4-11-44.

Mr. Anthony: Your Honor, there are a number of official documents that have been referred to, and I want it to be understood that we are at liberty to refer to any of these official documents, such as the Report of the Chief of Staffs, without the necessity of offering it in evidence, or the Roberts' Report, or the Tolan Committee Report, which I will make available to the Court. As a matter of law under the Federal statute, these documents, I think, may be taken judicial notice of by your Honor. There is no need to have them physically in the record.

Mr. Ennis: This is my view in respect to these Government documents, your Honor.

The Court: Yes, and it is the Court's view.

Mr. Ennis: We would like to discuss with your Honor, either here or in the Chambers, what arrangements we might make for [732] argument of the case. What we would like to do would be to argue the case tomorrow, if we could, your Honor.

The Court: Have you rested or are you about to rest now?

Mr. Ennis: Your Honor, I think the Respondent is prepared to rest, as I believe the Petitioner is, subject to final check together as to whether we have everything in that we want to stipulate. Substantially, we are finished with the trial, as far as we are concerned.

Mr. Anthony: How about the last attack on the vessels between the mainland of the United States and here?

Mr. Ennis: Oh, yes.

Mr. Anthony: From the Territory of Hawaii.

Mr. Ennis: The last attack upon a vessel within the Territorial water of Hawaii has been within the last five months.

Mr. Anthony: Well, if the Court please, that isn't the question I asked. Apparently they don't want to give me the answer to the question.

Mr. Ennis: Well, I do. I understood from what you just stated that that was the question you asked. If that isn't correct, let's get straightened out.

Mr. Anthony: No. Your Honor, in asking whether or not any of these vessels—when I read the evidence into stipulation, your Honor asked how many of these vessels had been attacked. I asked that question but was not given the information for reasons deemed adequate to the Military and Naval Services. Then your Honor asked when the last attack took place. This was in connection [733] with the convoy system between the West Coast and Hawaii. Now, I don't understand that as responsive to this question. Is that your understanding?

Mr. Ennis: Well, this is the best information I have been able to obtain, Mr. Anthony, on the subject.

The Court: Well, now, how long would it require to discuss any matters with the Court preliminary to argument? The Court is prepared to make a statement more or less directive at this time as to what argument, at least in part, you might eliminate, as to what subjects you might eliminate from the argument.

The questions in this case are not whether Lloyd C. Duncan created a disturbance on a Naval reservation where he was employed, or whether he committed an assault on marine guards or was assaulted by marine guards, or whether he had a fair trial before an Army Provost Court, in accordance with late day practice before such courts, or whether he was unjustly found guilty and given an inordinately severe sentence upon the offense charged, or whether he was mistreated by the Sheriff in being forced to perform hard labor when the mittimus under which

the Sheriff took him in custody did not impose labor, nor whether the Sheriff has any lawful right or power to assign hard labor upon a prisoner taken by him into the City and County Jail, even had the mittimus demanded it.

These questions were of passing interest during the trial and such testimony was offered as to some of them, but at this time, upon a general review of the situation, all of them are considered immaterial and irrelevant to the predominant and [734] controlling question presented in the case, and all evidence relating to them is ordered stricken and will be disregarded.

The question here is: Has a Provost Court, set up in the Navy Yard at Pearl Harbor, Oahu, under an order of October 27, 1943, of the Military Governor of the Territory of Hawaii, lawful power to try and convict a civilian residing outside of any Naval or Military reservation, of violation of an order of the Military Governor of March 10, 1943, committed on a Naval reservation with respect to Naval personnel?

Now, it seems to me that that question encompasses the entire case. So by way of a preliminary announcement by the Court, if that will save you time and reduce the scope of your arguments, why that is what it was intended for.

Now, are there other matters or problems in connection with the argument that you want to discuss?

Mr. Ennis: No, your Honor, only the question of filing briefs after the argument.

The Court: I think that it would be better to

consider and pass upon that after hearing such oral argument as you might choose to make. At this time I can't foresee any helpfulness that might come from filing briefs. It will depend largely upon the convincing clarity and reasoning of your oral argument.

Mr. Ennis: Could we have the argument tomorrow, your Honor?

The Court: Yes. Again, at what hour do you wish to argue? [735]

Mr. Ennis: Nine o'clock.

The Court: Is that agreeable?

Mr. Anthony: It's all right with me.

Mr. Ennis: Do you wish to fix the amount of time for oral argument?

The Court: In this case I don't care to impose any limit. I would be thankful if you could both give me an estimate of the probable time that it would require for opening and closing argument, if you can make any estimate at this time.

Mr. Ennis: As far as I am concerned, we ought to be able to handle it in one session tomorrow morning, that is, both sides altogether.

The Court: And finish before noon?

Mr. Ennis: Yes.

Mr. Anthony: Yes.

The Court: However, if you want more time, it is available to you.

Mr. Ennis: Thank you, your Honor.

Mr. Anthony: We haven't arranged the order of argument, your Honor.

The Court: Well, it may be a little difficult in a technical way to say who has the opening and who the closing. I would assume at first blush that the Petitioner would carry the burden and have the opening and closing.

Mr. Ennis: That is entirely satisfactory, your Honor.

Mr. Anthony: All right. [736]

The Court: Is there anything else before the Court?

The Clerk: No, your Honor.

The Court: The Court is adjourned until nine o'clock tomorrow morning.

(The Court adjourned at 12:35 o'clock, p. m.) [737]

Honolulu, T. H.
April 12, 1944
9:07 a. m. to 12:10 p. m.

Arguments were presented as follows:
Mr. Anthony in behalf of the Petitioner;
Mr. Ennis in behalf of the Respondent.

On April 13, 1944, at 10:05 o'clock a. m., Delbert E. Metzger, Judge, filed a written decision with the Clerk of the Court. [738]

I, Albert Grain, Court Reporter, U. S. District Court, Honolulu, Territory of Hawaii, do hereby certify as follows:

That I am the Official Reporter of the above-named U. S. District Court;

That the foregoing is a true and correct transcript of testimony taken by me and transcribed from my stenographic notes in Habeas Corpus No. 298, In the matter of the Application of Lloyd C. Duncan for a Writ of Habeas Corpus, held in the above-named Court on April 5, 6, 7, 8, 11 and 12, 1944, before the Hon. Delbert E. Metzger, Judge.

Apr. 29, 1944.

ALBERT GRAIN,
Official Court Reporter. [739]

[Title of District Court and Cause.]

A hearing was held on the above-entitled matter in the Judge's Chamber, Federal Court Building, Honolulu, Territory of Hawaii, on April 27, 1944, at 9:40 o'clock, a. m. [740]

The Court: As I understand it, this session is for the purpose of notifying the Court of the Petitioner's present position.

Mr. Anthony: Yes, the circumstances of the Petitioner's present position. At this time, if the Court please, I'd like to make a statement in regard to the Petitioner, which is this:

As the Court knows, the judgment in this case discharges the prisoner and further provides that

in the event of an appeal the Petitioner is released on his own personal security; that is in obedience to Rule 45 of the Supreme Court.

The Petitioner, immediately upon the issuance of the writ in this case and prior to the determination of the cause on its merits, was released upon bond. The bond was deposited and he was out on bail pending the trial on the merits. At that time the Petitioner, acting under my advice, reported to work at the Pearl Harbor Navy Yard and he was refused admission at the gate. He asked his brother, Mr. James Duncan, to intercede in his behalf, and his brother ascertained that under no circumstances would the Petitioner be permitted to return to work at the Pearl Harbor Navy Yard while his case was pending. Accordingly, the Petitioner did not return to work.

After the final determination of this cause and the rendering of the Court's opinion, he again presented himself for work at Pearl Harbor and again was refused admission, and he ascertained through his brother, who is a worker at Pearl Harbor, that Commander McCafferty and those in charge of the Pearl Harbor Navy Yard had given definite instructions that the Petitioner would not be permitted to return to work but that the Petitioner would [741] be transferred to the Mare Island Navy Yard in California.

In view of the fact that this man is a skilled mechanic, and the work that he does can only be done at Pearl Harbor Navy Yard here in the Territory, he has no alternative but to leave the jurisdiction of

the Territory of Hawaii and seek work elsewhere. And accordingly, under those circumstances, he has agreed to be transferred to the Mare Island Navy Yard.

Our purpose in coming before this Court is to apprise the Court of the situation that the Petitioner now finds himself in, so that the Court may know that under the arrangement that has been made with the U. S. Navy Yard he is about to be transported to Mare Island for employment.

We have prepared and will file in this Court his personal undertaking to respond to any judgment in any Appellate proceedings. What we are doing here is simply advising the Court of what the Petitioner is obliged to do, so that the Court may make such order as it deems appropriate under the circumstances.

The Court: The personal recognizance without surety would be accepted by the Court, and the surety heretofore given is discharged.

Mr. Anthony: And the cash bail is ordered refunded?

The Court: Yes.

(The hearing adjourned at 9:50 o'clock, a. m.) [742]

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, Territory of Hawaii, certify as follows:

That the foregoing is a true and correct transcript of proceedings in Habeas Corpus No. 298, in the matter of the application of Lloyd C. Dun-

can for a Writ of Habeas Corpus, held in the Judge's Chamber on April 27, 1944, at 9:40 a. m.

Apr. 29, 1944.

ALBERT GRAIN. [743]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
Territory of Hawaii.—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages numbered from 1 to 743, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above entitled cause as the same remain of record and on file in my office; and I further certify that I am including with said record the following exhibits:

Petitioner's Exhibits "A" to "H" inclusive, "J" to "N" inclusive and "P" to "V" inclusive

Respondent's Exhibits Nos. 1 and 4 to 18, inclusive,

that the costs of the foregoing transcript of record on appeal are $113.45 and that said amount has been charged by me against the United States. [744]

In Testimony Whereof, I have hereto set my hand and affixed the seal of said Court this 2nd day of May, A. D. 1944.

[Seal] WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
Territory of Hawaii. [745]

[Endorsed]: No. 10763. United States Circuit Court of Appeals for the Ninth Circuit. Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu, Appellant, vs. Lloyd C. Duncan, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed May 5, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10763

UNITED STATES EX REL DUNCAN,
Appellee,

v.

KAHANAMOKU,
Appellant.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

The judgment of the District Court ordering the discharge of the appellee from custody upon a writ of habeas corpus was erroneous in that:

I. The pleadings consisting of the petition for a writ, order to show cause why a writ should not issue, the return and answer to the petition, to the order to show cause and to the return, and the traverse disclose that the privilege of the writ of habeas corpus was lawfully suspended and martial law lawfully existed pursuant to public proclamations of the Governor of the Territory of Hawaii issued pursuant to the Organic Act of the Territory; and that pursuant to such martial law the appellee had been convicted by a military provost court and was imprisoned and detained by appellant for the violation of the military regulation involved herein; and therefore it appeared upon the pleadings that a writ of habeas corpus should not have issued, and appellee should not have been released

on bond pending a hearing, and should not have been discharged.

1. The writ should not have been issued.

2. The appellee should not have been released on bond prior to a determination of the case.

3. Under the Organic Act the suspension of the privilege of the writ and martial law promulgated by the Governor with the approval of the President and continued by further Proclamation of the Governor, continues until promulgation of its termination by the President, or by the Governor with the approval of the President, and could not be terminated by the District Court.

II. Upon the hearing and trial on the pleadings it was established that there was a reasonable basis for the judgment that imminent danger of invasion requiring the continued suspension of the privilege of the writ and existence of martial law and that there was no basis for invalidation of that judgment by the District Court; that the privilege of the writ lawfully continued to be suspended and martial law continued in existence and the appellee was lawfully detained pursuant to martial law and could not lawfully be released upon a writ of habeas corpus.

1. The executive authorities which proclaimed martial law and the suspension of the privilege of the writ have the power to terminate martial law and the suspension of the privilege of the writ and in the circumstances of this case the judicial authorities do not have such power.

2. There was a rational basis for the honest judgment and determination that there was immi-

nent danger of invasion and that the suspension of the privilege of the writ and the existence of martial law should be continued and in the absence of fraud or caprice the District Court lacked power to invalidate that judgment.

3. Even if the privilege of the writ was not suspended, martial law existed and the appellee's discharge should have been refused on the merits on the ground that he was lawfully detained under martial law.

III. Apart from the suspension of the privilege of the writ and the existence of martial law generally or in other cases, the particular application of martial law here involved, trial by a military court for the offense of assault and battery on a military sentry on duty within the Pearl Harbor Navy Yard with intent to impede him in the performance of his duties in time of war was lawful and required by military necessity and the privilege of the writ was suspended in such case and even if not suspended, the writ should have been refused or discharged on the merits and the appellee should not have been discharged.

G. D. CROZIER,
United States Attorney, District of Hawaii;
EDWARD J. ENNIS,
Special Assistant to the Attorney General,
Attorneys for Appellant.

[Endorsed]: Filed May 13, 1944. Paul. P. O'Brien, Clerk.

CLERK'S COPY.

Vol. IV

TRANSCRIPT OF RECORD

(Pages 1185 to 1234)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 14

LLOYD C. DUNCAN, PETITIONER,

vs.

DUKE PAOA KAHANAMOKU, SHERIFF OF THE CITY AND COUNTY OF HONOLULU

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1944.

CERTIORARI GRANTED FEBRUARY 12, 1945.

No. 10763

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DUKE PAOA KAHANAMOKU, etc.,

Appellant,

vs.

LLOYD, C. DUNCAN,

Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, July 1, 1944.

Before: Wilbur, Garrecht, Denman, Mathews and Stephens, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION, ETC.

Upon consideration of the application of Mr. Wayne M. Collins, Ordered permission granted to file brief of American Civil Liberties Union as Amicus Curiae, with leave to counsel for appellant to reply thereto, if so advised.

Further Ordered appeal herein argued by Mr. Edward J. Ennis, Director, Alien Enemy Control Union, Department of Justice, counsel for appellant, and by Mr. J. Garner Anthony, counsel for appellee, and, on oral stipulation of said counsel, submitted to Wilbur, Garrecht, Denman, Mathews, Stephens and Healy, Circuit Judges, for consideration and decision, with leave to file Law Review Articles.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, November 1, 1944.

Before: Wilbur, Denman, Stephens and Healy, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten opinions this day rendered by this Court in above cause be forthwith filed by the clerk, and ~~that~~ a decree be filed and recorded in the minutes of this Court in accordance with the opinions rendered.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,763

In the Matter of the Application of Lloyd C. Duncan, for a Writ of Habeas Corpus.

DUKE PAOA KAHANAMOKU, Sheriff, City and County of Honolulu,

Appellant,

vs.

LLOYD C. DUNCAN,

Appellee.

No. 10,774

November 1, 1944

In the Matter of the Application of HARRY E. WHITE, for a Writ of Habeas Corpus.

WM. F. STEER, Colonel, Infantry, United States Army, Provost Marshal, Central Pacific Area,

Appellant,

vs.

HARRY E. WHITE,

Appellee.

OPINIONS

Upon Appeal from the District Court of the United States for the Territory of Hawaii

Before: Wilbur, Garrecht, Denman, Mathews, Stephens, and Healy, Circuit Judges.

Healy, Circuit Judge

The appeal in each of these cases is from a judgment of the United States District Court for the Territory of Hawaii sustaining a petition for a writ of habeas corpus and ordering the discharge of the petitioner.

In case No. 10,774 the essential facts are as follows: Appellee Harry E. White is a citizen of the United States and of the Territory of Hawaii. On August 20, 1942, while engaged in Honolulu as a civilian in a brokerage and investment business, he was arrested and brought before Major Murrell, judge of the provost court, who informed him that he was to be tried before that court on a charge of embezzlement growing out of the conduct of his business, in violation of Chapter 1831, Revised Laws of Hawaii, 1935. He was on August 25, 1942 tried by the provost court upon that charge, without a jury, was convicted and sentenced to imprisonment for a term of five years. The sentence imposed was within the limits prescribed by the territorial statute.

On April 14, 1944, White filed his petition in the court below for release on habeas corpus, asserting lack of jurisdiction in the provost court and claiming that he had been deprived of the rights guaranteed by the 5th and 6th Amendments. The court issued a show cause order directed to the warden of Oahu Prison. It was later ordered, on stipulation, that Colonel Steer, Provost Marshal of the Central Pacific Area, and then custodian of the petitioner, be substituted as respondent in lieu of the warden.

The Provost Marshal filed an answer in which he admitted the facts as stated above but denied that the trial and imprisonment were unlawful. The answer contained affirmative matter, alleging, among other things, the suspension of the privilege of the writ, the declaration of martial law, and the existence as of August 1942 of an emergency necessitating the trial of civilians by a provost court as provided in the then subsisting orders of the commanding general; and it was asserted that the offense of which the petitioner had been convicted was not cognizable in the civilian courts because of the terms of the Governor's proclamation of December 7, 1941.

The petitioner, by traverse, put in issue the allegations of the answer. Thereupon the writ was issued, the petitioner was produced and evidence taken. It was stipulated that the return to the order to show cause be considered the return to the writ of habeas corpus, and that the traverse to the return to the show cause order be considered the traverse to the return to the writ. Being of opinion that the provost court was without lawful authority to try the charge, the court ordered petitioner's release from custody.

The facts in case No. 10,763 are these:

Appellee Lloyd C. Duncan is a citizen of the United States living temporarily in the Territory of Hawaii, where he was in the civilian employ of the Navy Department at Pearl Harbor. On February 24, 1944, while within the limits of the naval

reservation where he was employed, he assaulted and struck with his fists two marine corps sentries on duty at the main gate. Later he was summoned to appear before the provost court on the charge of assault with intent to obstruct the sentries in the lawful performance of their official duties, contrary to paragraph 8.01 of General Orders No. 2 of the Military Governor, dated March 10, 1943. He was tried by the provost court without a jury, was found guilty of the charge and was sentenced to serve a jail term of six months. He was then delivered into the custody of appellant, the sheriff of the city and county of Honolulu, and was confined by the latter in the Honolulu jail. Petition for the writ was filed March 14, 1944, and an order to show cause served on appellant the same day.

The sheriff made a return admitting the fact of the charge and conviction. The return alleged, in substance, that the public safety has at all times since December 7, 1941, required the continued existence of martial law and the suspension of the writ as proclaimed by the Governor of the Territory; that the General Orders referred to, respecting the establishment and authority of provost courts, were necessary for the successful prosecution of the war; and that the military action of punishing persons assaulting sentries engaged in the performance of their duty, with intent to hinder such performance, was not unreasonable or arbitrary.

As in the White case, the allegations of the return were formally put in issue by traverse. After hear-

ing argument the court issued the writ and the sheriff produced the petitioner. It was stipulated that the government's return to the order to show cause should stand as the return to the writ. There followed a trial at which testimony was taken bearing upon the truth of the situation as developed in the several pleadings. At its conclusion the court entered judgment discharging the petitioner from custody. The grounds given for the discharge were that martial law did not prevail in the Territory and that the provost court was without authority to try the petitioner.

As will later appear, there are substantial differences between these cases; but underlying each are the same fundamental questions, namely, (1) whether the court was in error in holding that the petitioner was unlawfully imprisoned, and (2) whether, in any event, the court was foreclosed from inquiring into the legality of the detention because of the suspension of the privilege of the writ. The points are discussed in the briefs in the order named. However, before considering the first point it will be convenient at the outset briefly to notice the second.

1. Availability of the writ. In Ex parte Zimmerman, 132 F. 2d 442, we held that the privilege of the writ of habeas corpus was lawfully suspended in the Territory by the Governor's proclamation of December 7, 1941, issued with approval of the President. It was thought by the trial court that the suspension was subsequently terminated by a proc-

lamation of the Governor issued with Presidential approval on February 8, 1943.

We do not agree. Without going into the matter in detail it is for present purposes enough to say that the later proclamation was not intended to terminate the suspension and did not have that effect. However, in view of the conclusion we have reached in respect of the legality of the imprisonment in each case, it is unnecessary to consider whether the emergency existing in the Territory as of the time of the filing of the petitions was such as to warrant the then suspension of the writ. Nor, for the same reason, is it essention to inquire into the applicability of the suspension to these particular cases. Compare Ex parte Quirin, 317 U. S. 1, 24, 25. For the purpose of the decision we assume, without deciding, that the court was not disabled from entertaining the petitions.

2. Legality of the imprisonment. The Governor's proclamation of December 7, 1941, in addition to suspending the writ, placed the Territory under martial law. The latter step, no less than the first, was authorized by the express language of § 67 of the Hawaiian Organic Act as is developed more at length in Ex parte Zimmerman, supra.[1] The step,

[1] So far as here pertinent, § 67 of the Organic Act provides: "The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, . . . to prevent or suppress lawless violence,

the effect of restoring all but a minor part of the civil authority.[13] The resumed functions included "judicial proceedings, both civil and criminal," except (1) criminal prosecutions against members of the armed forces; (2) civil suits against members of the armed forces in respect of any act or omission certified by the commanding general to be in the line of duty; and (3) criminal prosecutions for violations of military orders.

For immediate purposes, the pertinent exception to the resumption by the civil courts of full criminal powers is the one relating to "criminal prosecutions for violations of military orders." The proclamation, according to its terms, became effective March 10, 1943. On that date commanding General Richardson issued General Orders No. 2,[14] one paragraph of which provided in part that provost courts and military commissions should have jurisdiction and power to try any case involving a violation by a civilian of the rules, regulations, proclamations, or orders of the military authorities, nor of the laws of war.

Paragraph 8.01 of these orders provided, in substance, that no person shall commit "an assault or an assault and battery" on any member of the military police or other military or naval personnel,

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[13]In the trial below Governor Stainback testified that in his opinion about 95% of the civil powers were restored.

[14]These were intended as a revision of all previous general orders to conform to the changed legal situation.

"with intent to resist, prevent, hinder, or obstruct him in the discharge, execution or performance of his duties as such." No specific penalty was prescribed for a violation of the prohibition except that elsewhere in the order it is stated that the provost court will be guided, but not bound, by the penalties prescribed by the laws of the Territory in like cases. It was under paragraph 8.01 that Duncan was tried in the provost court in February of the following year.

Whether this provision of General Orders No. 2 was valid as applied to civilians poses a question of unusual delicacy and importance. The General Orders, as well as the proclamation of the Governor, proceeded on the express assumption that a state of martial law was to continue in effect. The proclamation, however, did not purport to render the civil authority thereafter subordinate to the military. The contrary, indeed, was to be the case in respect of all powers resumed. The courts were no longer to operate as agencies of the general in command; clearly, they were intended to function as a coordinate branch of the civil government which Congress had provided for the Territory. Thenceforward they were open. They were in full possession of the power to empanel grand and petit juries and were not in terms disabled from proceeding in the traditional manner to the trial of any criminal offense denounced by Hawaiian laws.

The first point to be noticed is that the conduct proscribed by paragraph 8.01 of the General Orders

as there said, had the immediate approval of the President.

By the terms of the proclamation Governor Poindexter called upon the commanding general, "during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor." He further authorized the commanding general, "and those subordinate military personnel to whom he may delegate such authority, during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this Territory and of the counties and cities thereon, and such other and further powers as the emergency may require." The people of the Territory were admonished to obey the proclamation and such rules and orders as the commanding general might issue. Responding to the proclamation, General Short at once assumed the post and title of Military Governor, and his successor, General Emmons, did likewise.

Invocation of the military power could hardly have been more complete. As interpreted by the executive and as applied by the commanding generals, the term "martial law" was here accepted as meaning nothing less than total military govern-

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invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the president and his decision thereon made known." 31 Stat. 153, §67, 48 USCA §532.

ment. From that time forward until March 10, 1943, the Territory appears to have continued under exclusive military rule.

By General Orders No. 4, issued December 7, 1941, General Short set up military commissions and provost courts with power "to try and determine any case involving an offense committed against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authorities." All civil courts were closed at that time. By General Orders No. 57,[2] issued January 27, 1942, the local courts were authorized "to exercise certain of the powers normally exercised by them during the existence of civil government." This regulation provided that "the United States District Court for the Territory of Hawaii, the Supreme Court of said Territory, and the justices thereof, the circuit courts, circuit judges at chambers, land court, juvenile court, tax appeal court and the district magistrates are hereby authorized, as agents of the Military Governor, to exercise their respective functions according to law, as it existed immediately prior to the declaration of martial law," subject to numerous restrictions. Among these were prohibitions against the exercise of jurisdiction of criminal cases and the empaneling of grand or petit juries.

The judicial status indicated by Order No. 57 appears to have persisted without material change

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[2]This order supplemented General Orders No. 29, issued December 16, 1941.

until March 1943. It would be a perversion of the truth to say that the courts were "open" during this period—certainly they did not function as a co-ordinate or independent branch of the government. So far as they were permitted to operate they did so "as agents of the Military Governor." Like existing civil officials of all grades throughout the Territory, the courts were mere instruments of the commanding general. Moreover, because of the prohibition against the assembling or empaneling of juries they were wholly disabled from trying criminal cases in the constitutional sense.

We intimate no criticism of what was done. Without doubt Governor Poindexter, the President, and the Generals in command proceeded in the bona fide belief that the establishment of complete military rule was a course dictated by necessity. Nor are the courts entitled to set themselves up as boards of strategy to judge, after the event, whether the belief was warranted by the emergency.[3] Certainly they may inquire no further than to consider whether the executive proceeded on reasonable grounds.[4]

We need comment but briefly on the dangers inherent in the Hawaiian situation or on the military importance of this exposed area. The Islands form the key outpost in the country's Western bastion of defense. As is now known, the surprise attack on Pearl Harbor was so devastating and the destruction wrought so nearly complete as to put

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[3]Hirabayashi v. United States, 320 U. S. 81, 93.

[4]Sterling v. Constantin, 287 U. S. 378.

the Islands in peril of actual seizure by the task forces of a powerful and determined enemy. While immediate steps were taken to convert Hawaii into a fortress, and while the Japanese ultimately met with vigorous opposition in other parts of the Pacific, the perils which beset this strategic area did not vanish overnight. It is the opinion of responsible military and naval authorities that as late as the spring of 1944 the Islands continued in imminent danger of attack from the air, of submarine forays and commando raids from the sea.[5]

Governmental and military problems alike were complicated by the presence in the Territory of tens of thousands of citizens of Japanese ancestry besides large numbers of aliens of the same race.[6] Obviously the presence of so many inhabitants of doubtful loyalty posed a continuing threat to the public security. Among these people the personnel of clandestine landing parties might mingle freely, without detection. Thus was afforded ideal cover for the activities of the saboteur and the spy. In sum, the situation was such that informed leadership would be answerable at the bar of history if it presumed to take unnecessary chances.

But, it is said, there was no disorder in the Islands, and the courts were ready to function if only

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[5]General Richardson and Admiral Nimitz so testified on the hearing below. They stressed, also, the various considerations outlined in this portion of the opinion.

[6]According to the record, 32.36% of the total population of Hawaii in 1940 was comprised of persons of Japanese ancestry or nativity.

they were permitted to do so. Remembering the conditions which we have described the argument does not impress us. To function in criminal matters the civilian courts must assemble juries; and citizens of Japanese extraction could not lawfully be excluded from jury panels on the score of race—even in cases of offenses involving the military security of the Territory. Indeed the mere assembling of juries and the carrying on of protracted criminal trials might well constitute an invitation to disorder as well as an interference with the vital business of the moment. And the summary punishment of criminal offenders of every sort might conceivably serve to discourage the commission of offenses immediately endangering the general security.

The question, then, is not whether the temporary administration of criminal justice by military tribunals was warranted by the emergency, but whether such a displacement of the judicial power can fairly be said to fall within the term "martial law," as that term is generally understood[7]—more particularly as it was employed in §67 of the Organic Act. Presumably Congress intended to authorize the institution by the Governor, with Presidential approval, of such measures of military control as might be thought necessary to deal with

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[7]Consult Wiener, A Practical Manual of Martial Law (1940), 10, where the author says: "In its broad sense, martial law is the carrying on of government in domestic territory by military agencies, in whole or in part, with the consequent supersession of some or all civil agencies."

any situation possible of occurrence in this remote archipelago, the turbulent history of which was fresh in the minds of the legislators. The emergency arising as the result of insurrection or invasion, or the imminent threat of either, might be of brief duration. Conceivably it might persist for a long time. If, in the latter event, it should become necessary to close or restrict the functioning of the civilian courts, the administration of ordinary criminal justice could not proceed except through the medium of military tribunals. Congress can not be thought to have intended that the suppression or punishment of crime must await the return of tranquillity or the resumption of civil authority.

The framers of the Act took verbatim from the Constitution of the Republic the provision authorizing the suspension of the writ and the placing of the Islands under martial law in the named contingencies.[8] Five years before its adoption by Congress that provision had been interpreted by the Supreme Court of the Republic in the case of In re Kalanianaole, reported in 10 Hawaii 29 (1895). The decision, we think, throws important light on the intent of Congress as later given expression in the law providing for the organization of the Territory.

The case of Kalanianaole arose out of a local insurrection which had been quickly suppressed. The courts were closed during its continuance and were

[8]The provision was contained in Article 31 of the Hawaiian Constitution.

not soon restored to the unobstructed exercise of their jurisdiction. Martial law had been declared by the president of the Republic and a military commission set up for the trial of such persons as might be brought before it. Kalanianaole was tried and convicted by the commission on the charge of misprison of treason, an offense denounced by a statute of the Republic and normally triable only in the civil courts. His petition for release on habeas corpus, addressed to the Supreme Court of the Republic, was denied, the court holding that he was lawfully imprisoned pursuant to the judgment of the military commission. It was thought that the setting up of the commission and the trial by it of civilian offenders was an incident of the institution of martial law, hence was impliedly authorized by Article 31 of the Constitution.[9]

We think little is to be gained by a review or an extended citation of the general authorities dealing with the subject of martial law.[10] The term "martial law" appears, indeed, incapable of exact defini-

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[9]The opinion in the case was written by Justice Frear, later Governor of the Territory.

[10]The authorities have been collected by law writers in recent articles undertaking to discuss the subject in the light of the present emergency and are readily available to the general reader. Cf. Charles Fairman, The Law of Martial Rule and the National Emergency, published in Harvard Law Review, June 1942; Archibald King, The Legality of Martial Law in Hawaii, Vol. XXX California Law Review, Number 6, September 1942. Consult generally, Wiener, A Practical Manual of Martial Law (1940).

tion.[11] It is probably just to say that the term, consistently with constitutional principles, comprehends every measure necessary to preserve the life of the state and to repel the enemy. It must not be forgotten that a cardinal purpose for which the federal constitution was set up was to "provide for the common defense."

In Ex parte Milligan, 71 U. S. 2, 127, the majority of the court recognized that in circumstances where the courts are actually closed there is necessity to furnish a military substitute in the administration of ordinary criminal justice for the duration of the emergency. The constitutional guarantees of indictment and trial by jury do not extend to such a situation, for, as said in Ex parte Quirin, 317 U. S. 1, 39, while presentment by grand jury and trial by jury were familiar machinery for criminal trials at the time of the adoption of the Constitution, the procedures were unknown to military tribunals. "The latter," said the Court, "are usually called upon to function under conditions precluding resort to such procedures." The Court

[11]Consult, for example, the discussion of Chief Justice Chase in his concurring opinion in Ex parte Milligan, 71 U. S. 2, at p. 141. In important respects his definition of the term is unsatisfying. In the year 1857 Attorney General Cushing remarked on "the extreme want of preciseness" with which the subject had been discussed by common law authorities and commentators. These, he said, afforded "no clue to what martial law, as understood in England, really is;" and he observed that in this country the situation was "even worse." 8 Opinions Attorney General 365, 367, 368.

added that "it was not the purpose or effect of §2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial."

At the time appellee White was tried complete martial rule was in effect and the civil courts were disabled from functioning. The situation necessitated his trial by the military. Moreover, authority for such procedure is implicit in the act of Congress providing for the organization of the Territory.

We turn now to the case of appellee Duncan.

The legal situation in the Islands at the time of his trial differed markedly from that earlier prevailing. In January 1943 a conference was held in Washington, participated in by Governor Stainback of the Territory, the Secretary of the Interior, the Secretary of War, and the Attorney General. The conference resulted in the issuance by Governor Stainback, on February 8, 1943, of a proclamation which had the prior approval of the President. This document proclaimed that on the thirtieth day thereafter the Governor of Hawaii and the other civilian officers and agencies of the federal, the territorial, and the local governments, would resume their respective jurisdictions, functions, and powers, according to law, with respect to a very great number of matters, and others necessarily related thereto.[12] It is said that the proclamation had

[12] In passing, it is important to note a provision to the effect that "nothing in this proclamation shall operate to invalidate any conviction . . . which occurred or shall occur prior to the thirtieth day hereafter."

the trial court found as a fact that "while the Island of Oahu may have been on March 2, 1944, and thereafter to this day, subject to possible attack by enemies at war, that it was not then, nor is it now, in imminent danger of invasion by hostile forces, neither was or is it in rebellion." The trial court found as a fact that the civil government was in efficient operation.[1]

In support of the claimed necessity for continued maintenance of partial martial law, Lieut. General Richardson of the United States Army, in command of that area, and Admiral Nimitz of the United States Navy, in charge of the naval operations through the Pacific, each testified that in his opinion the continuance of martial law was necessary in the Territory of Hawaii for the protection of the territory and the of United States. The trial judge, notwithstanding their opinions and orders, concluded that there was no danger of invasion and no continued necessity for martial law and ordered the appellee released. We thus have diametrically opposed views of the situation by the General and Admiral responsible for the defense of the Hawaiian Territory, and also for the defense of the United States, and of the judge who had no responsibility

[1] "I find from the evidence that at all times during the year 1943 and continuing to this day, conditions were such throughout all the principal islands of the Territory of Hawaii that the regularly constituted civil government was either in efficient operation or fully capable of such operation in all its branches and ordinary departments and was sufficiently equipped, capable and willing to perform all functions for which it was created."

therefor. Under such circumstances the question is not difficult of solution, for it has been held by our Supreme Court in Moyer v. Peabody, 212 U.S. 78, decided in 1909, that the federal court had no jurisdiction of an action for false imprisonment against the Governor of the State of Colorado who had seized and imprisoned the plaintiff Moyer for 76 days and had suspended the privilege of the writ. The court said:

"It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact. It seems to be admitted also that the arrest alone would not necessarily have given a right to bring this suit. But it is said that a detention for so many days, alleged to be without probable cause, at a time when the courts were open, without an attempt to bring the plaintiff before them, makes a case on which he has a right to have a jury pass. * * * So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subject to an action after he is out of office on the ground that he had not reasonable ground for his belief. * * * Public danger warrants the substitution of executive process for judicial process."

It would seem clear from this decision, as well as from principle, that the decision as to whether or not the continued suspension of the writ was necessary was one entirely for the executive authorities, if made in good faith and upon an honest belief. We shall examine that question for a moment.

Was the situation such that an executive could

is beyond the scope of the Articles of War.[15] It affects civilians in no way connected with the military or naval forces, and therefore not normally amenable to military discipline. Again, there is no specific act of Congress authorizing the promulgation of the regulation or confirming its validity by making the violation of such a military order a criminal offense. Congressional authority can be looked for only in the provision of the Organic Act authorizing resort to martial law.

It is to be recalled that in respect of the military control of Japanese resident on the Pacific Coast, Congress felt it appropriate to denounce as a misdemeanor any infraction of the pertinent military orders relating to their control and removal; and offenders were made subject to trial exclusively in the civil courts. See Act of March 21, 1942, 56 Stat. 173; cf. Hirabayashi v. United States, 320 U. S. 81. It is true that martial law had not formally been proclaimed in the affected area; but a state of qualified martial law nevertheless existed there more drastic, in certain of its aspects, than that prevailing in Hawaii during the period now in question. However, as later pointed out, we think it is not a necessary consequence of the congressional policy manifested in this instance that appropriate military orders affecting civilians are invalid in the absence of express legislative sanction.

The law of Hawaii defines the offense of assault and battery and prescribes penalties for its viola-

[15] 10 USCA §§1471-1593.

tion.[16] There is a territorial statute imposing a much heavier penalty for the commission of "an assault or an assault and battery on any public officer, civil or judicial, with intent to resist, prevent, hinder or obstruct him in the discharge or execution of his duty as such."[17] There is however, no statute punishing a battery of that aggravated nature committed upon personnel of the armed forces while acting in the line of duty; and it was the latter offense that was proscribed by the regulation under which Duncan was tried.

It is clear that the civil courts were without jurisdiction to try one accused of an offense of this character, unknown, as it was, to Hawaiian law. In the absence of enabling legislation their powers extended no farther than to try those accused of offenses denounced by statute. In sum, even in the absence of the prohibition contained in the Governor's proclamation, they were not competent to try Duncan for the offense with which he was here charged. It thus becomes necessary to consider whether the military were competent to define such conduct as an offense and proceed to the trial and punishment of one accused of it.

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[16]Revised Laws of Hawaii 1935, C. 166, §§5651, 5659.

[17]Revised Laws of Hawaii 1935, C. 166, §5657. The penalty prescribed is a fine of one thousand dollars or imprisonment for not more than one year. The penalty for simple assault and battery, as prescribed by the statute relating thereto, is a fine of not more than one hundred dollars or imprisonment for not more than six months.

The condition of emergency existing in the Islands has already been noted. It was testified by General Richardson and by Admiral Nimitz that these conditions prevailed as late as March and April of 1944. In the opinion of these responsible commanders the danger of attack and invasion, if less serious and pressing than before, still continued imminent. They characterized the Hawaiian area as an integral part of the theatre of actual military operations in the Pacific. General Richardson expressed the belief that the continuance of martial law, to the extent it was then in effect in the Territory, was necessary not only for the safety of the Islands but for the defense of the nation. That the President and the Governor were of the same opinion is evidenced by the proclamation, one provision of which, as has been seen, contemplated the continued prosecution in the military courts of those accused of the violation of military orders.

In Hirabayashi v. United States, supra, at page 93, the Court observed that the war power of the national government extends to every matter and activity so related to war as substantially to affect its conduct and progress. "The power," said the Court, "is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution, and progress of war. [citing cases] Since the Con-

stitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of threatened injury or danger and in the selection of the means for resisting it. [citing cases] Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."

In emergencies arising out of total war there are fields in which civilian conduct is necessarily impinged upon by regulations of the military, even in areas which are not regarded as part of the theatre of actual warfare. Of this we have had during the existing emergency many familiar examples, such as regulations concerning blackouts, dimouts, curfews, and the like—all of them recognized as essential to military security. The power to punish infractions of military regulations of this type must of necessity reside somewhere. If it has not by legislation or municipal ordinance been delegated to the ordinary courts or made subject to the authority of the civil police, the power must perforce exist in the military arm of the government acting through the medium of commissions or like tribunals.

Paragraph 8.01 of the General Orders is a regu-

lation of this type. As seen, it had no counterpart in the statutes of the Territory. Nor was there statute or ordinance in existence making the infraction of it an offense triable in the courts. It can hardly be doubted that the provision was a reasonable measure. We are not able to say that, under the conditions shown to exist in this vital area, an assault upon a sentry or a member of the military police with intent to obstruct him in the discharge of his duty, was an offense of so little consequence to the public security that it called for no punishment at all or that its punishment in the civil courts as a simple battery was adequate to meet the needs of the hour. That Duncan's effense was of this aggravated nature the record does not admit of doubt.

Whether, in the situation prevailing in the Islands since March 1943, the military are competent to define and punish ordinary civilian offenses punishable as of course in the civilian courts is a question that is not before us.

There was nothing in the showing made in either of these cases which would warrant release on habeas corpus on grounds having to do with the fairness of the trials in the provost courts. Nor did the court below make any finding of unfairness in the conduct of the trials. The writs should have been discharged and the petitioners remanded to custody.

The judgments in both cases are reversed.

Garrecht, concurring.

I concur in the opinion of Judge Healy.

Wilbur, Circuit Judge, concurring:

I am authorized to say that Judge Mathews joins me in this opinion. We concur in the opinion of Judge Healy concerning the effect and existence of martial law in the Territory of Hawaii and in the conclusion that the appellees should be returned to the custody of the respective appellants.

We also concur in the conclusion stated in the opinion of Judge Healy, that the proclamations hereinafter referred to were not intended to terminate the suspension of the privilege of the writ and did not have that effect. We further hold that such changed conditions as had occurred in the Territory did not restore the right to the writ of habeas corpus. This conclusion on this matter would also require that the appellees be restored to the custody from which they were taken under the writ of habeas corpus and the orders discharging them from custody be reversed.

We deem it desirable to state this additional ground for reversal of the orders of the trial court because the undetermined nature and effect of martial law whether exercised by virtue of the necessities of war or under express authorization, constitutional or statutory, is a matter of great doubt when sought to be applied in individual instances, as in the cases at bar. The right to suspend the privilege of the writ of habeas corpus is derived directly from the Constitution of the United States. Such suspension is also authorized by the organic law of the Territory of Hawaii, and the power is sought to be broadened by that law to situations

where there is imminent danger of invasion as well as actual invasion, although the two phrases are probably of identical significance when reasonably interpreted.

We now consider the rights of the appellees with reference to the suspension of the writ of habeas corpus.

The trial judge, feeling himself bound by previous decisions of the United States District Court for the Territory of Hawaii, announced that the privilege of the writ of habeas corpus was not suspended at the time of the appellees' application. This conclusion was based upon the proposition that the order suspending the privilege of the writ had been set aside by subsequent orders, as will be presently stated. Our discussion of the subject is shortened by the fact that we have already considered and decided, in Ex parte Zimmerman, 132 F. 2d., 442, the question as to whether or not the privilege of the writ of habeas corpus was suspended in Hawaii from and after December 7, 1941, and if so, the effect of such suspension. We there held, Judge Healy writing the opinion, that for the reason that the suspension of the writ precluded such action, the court was powerless to release from custody a citizen of the United States detained by the military authorities in Hawaiian Territory. The facts with relation to the various proclamations and orders suspending the privilege of the writ are set out in that opinion and need not be here repeated. Suffice it to say that it was there held that the Territory of Hawaii was invaded by the Japanese on

the morning of December 7, 1941; that the proclamation of the Governor of the Territory of Hawaii, approved by the President of the United States, lawfully suspended the privilege of the writ as authorized by section 67 of the Organic Law of the Territory of Hawaii, passed April 30, 1900 (31 Stat. 153). The Constitution of the United States, Article I, section 9, clause 2, provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." We start then with the proposition heretofore determined by this court, that the proclamation of the Governor suspending the privilege of the writ of habeas corpus and declaring martial law, approved by the President of the United States, was valid and binding on the courts. If the privilege of the writ is still suspended, then under our decision in Ex parte Zimmerman, supra, the action of the trial court must be reversed and the appellees remanded to the custody of the appellant where he had been placed by the military authorities.

The appellees' claim that the privilege of the writ of habeas corpus is no longer suspended in the Territory of Hawaii is based upon two distinct propositions: First, that it was officially ended by appropriate proclamation on February 8, 1943, and, second, that even if there was no such formal restoration as a matter of fact the necessity for martial law and the suspension of the writ has ceased and, therefore, by reason of such changed conditions

martial law no longer exists and the suspension of the writ is no longer effective. We shall first consider the contention with reference to the restoration of the privilege of the writ by proclamation of February 8, 1943.

On that date the Governor of the Territory of Hawaii issued a proclamation declaring the partial suspension of martial law and it is claimed that the proclamation also, in legal effect, reestablished the privilege of the writ of habeas corpus, although not specifically declared. The proclamation of February 8, after stating: "Whereas, a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended", proceeds to restore civilian officers and agencies of the federal territorial and local governments to their "respective jurisdictions, functions and powers" concerning, among other things "judicial proceedings both criminal and civil", with certain exceptions which are not of present concern. Governor Stainback, who issued the proclamation, testified that in his opinion it restored at least 95 per cent of civil authority. That the proclamation was not intended to effect the suspension of the privilege of the writ of habeas corpus is clear from what preceded, and what was contemporaneous with, the proclamation of the Governor. The proclamation resulted from a conference held in Washington, D. C., in which the Governor of the Territory of Hawaii, the Secretary of the Interior, the Secretary of War, and the Attorney General, joined in discussions and agreements leading to the approval

by the President of the proposed proclamation of February 8, 1943, and to its promulgation. In the joint letter to the President of January 18, 1943, submitting to him the agreement above referred to, it was said:

"Pursuant to this agreement the Governor of Hawaii and the Commanding General will issue simultaneous proclamations. Their effect is to leave unchanged the state of martial law and the suspension of the writ of habeas corpus, to restore to the civil government the majority of civil functions hitherto exercised by the military authorities, and to provide emergency powers for the military government."

The letter of the President dated February 1, 1943, addressed to the Secretary of War, acknowledged the receipt of the proposed proclamation to be issued concurrently by the Commanding General and the Governor of Hawaii and approved the same, stating: "In an area of such strategic importance as the Hawaiian Islands in a time of active war in the Pacific, I can readily appreciate the difficulty in defining exactly the boundaries between civil and military functions. I think the formula which this proclamation applies meets the present needs."

When Governor Stainback returned to Hawaii he issued the proclamation in accordance with the agreement above referred to and concurrently therewith published a statement which, among other things, says: "After numerous conferences among representatives of the War, Justice, Interior De-

partments and myself, it was agreed that martial law should be continued in Hawaii but that existing military control should be modified to restore to a large extent civilian control of civilian matters. My proclamation is the result of this agreement.

"Under the Act of Congress the Governor is 'responsible for the faithful execution of the laws of the United States and of the Territory' within the Territory. On December 7, 1941, the Governor of Hawaii issued a proclamation placing the Territory under martial law, which proclamation was subsequently modified by me on September 2nd, 1942. This proclamation issued today continues martial law and the suspension of the privilege of the writ of habeas corpus but modified those prior proclamations by restoring to the civil authorities jurisdiction in their respective fields over civilian affairs except for certain specified subjects which are primarily of military concern."

It seems perfectly clear that the Governor, who is vested with the power to declare martial law and to suspend the privilege of the writ of habeas corpus under section 67, supra, had no intention of restoring the privilege of the writ. It is a matter of doubt and undetermined whether or not the suspension of the writ, having been approved by the President and thus made an act of the President of the United States, could be restored by the unapproved action of the Governor. It is not necessary to determine this question for the reason that it is clear that the proclamation of the Governor, with the accompanying statement, shows that

he had no intention of vacating the order which suspended the privilege. We conclude that so far as the proclamation of February 3, 1943 is concerned, the privilege of the writ of habeas corpus remains suspended.

As to the second point as to the effect of changed conditions, the trial court having concluded that the privilege of the writ of habeas corpus was restored by proclamation, its attention was directed to the question of the effect of the changed conditions upon the proclamation declaring martial law which had only been revoked in part by the proclamation of February 8, 1943. As to the part of the proclamation purporting to continue in force a part of martial law, the argument is that as there is no longer danger of invasion, imminent or otherwise, the necessity for martial authority in the Territory has passed; consequently, the court need no longer recognize the authority of the military to detain the appellee in custody, which was merely an incident of the necessity of martial law. (This argument is based upon the decision of the Supreme Court in Ex parte Mulligan, 71 U. S. 1) No case is cited and none is found in which it is held that a change of condition alone would result in the restoration of the privilege of the writ of habeas corpus. But even if such were true the record does not disclose such a situation as would justify the application of such a rule, if it exists. A great deal of the testimony was directed to the military situation in the Territory at the time of trial and

say that the continued suspension of the privilege of the writ of habeas corpus was necessary?

Considering this question we not only have in evidence the public acts and declarations of a military Governor and of Admiral Nimitz, who are in charge of that area, but we also have their testimony under oath in this habeas corpus proceeding. Lieutenant General Robert C. Richardson, in response to the following question gave the following answer:

"Q. Now, General Richardson, based upon your appraisal of the military situation, will you state your opinion as to whether or not there is imminent danger of invasion of this Territory by the Japanese enemy?

"A. I shall state from a soldier's point of view the actual reality of the situation, without attempting to argue or define the academic definition of 'imminent danger of invasion.' We know that, at least we feel quite certain that the Japanese are totally incapable of coming to these islands with a large land-based force for the purpose of seizing and capturing it. We do not think that is within their capability at all. The time for that is past. And, therefore, if that interpretation is paramount in the mind of the layman, it may be eliminated. But you must remember that in law, as in other branches and other professions, times change. There are now developments. When that phrase was written, 'imminent danger of invasion,' nor [neither] the submarine, nor the airplane were in existence,

nor were they ever dreamed of. These two new weapons of war have enormous potentialities, and they have introduced into warfare the element of stealth, the element of surprise, and the element of speed. And, therefore, capitalizing on these new elements of warfare, our enemy, the Japanese, has at his disposal today a strong carrier force, destroyers, cruisers, battleships, and airplanes, and submarines, all of which combine those elements of stealth, surprise and speed.

"Therefore, they still have the capability of launching an attack, an invasion by air, an invasion by undersea, against these islands. And they have not only the capability itself; it is always impending, as long as their capability exists, the danger impends and the danger is imminent."

Admiral Chester W. Nimitz, United States Navy, Commander-in-Chief Pacific Fleet and Pacific Ocean areas, testified as follows:

"Q. Will you state, Admiral Nimitz, in a general way the strategic position of this Territory as part of your general command?

"A. The Hawaiian area constitutes the only base for the Navy that we have in the Pacific Ocean at the present time. It has the greatest importance to the fleet and to the Army for operations to the westward. Anything that is injurious to this area is prejudicial to our conduct of the war.

"Q. Do you believe, Admiral Nimitz, as a military matter or as a naval matter, that the Japanese enemy might or could attack these islands?

"A. Yes, they could. It is still within their capability to make carrier attacks behind the front, in spite of th daily searches that we make. We have never ceased, since December 7th, to search the areas from which we think those attacks are likely to come. Until the last Japanese carrier is destroyed, that capability will exist.

* * *

"Q. Admiral Nimitz, in addition to the possibility of an attack by carrier-based planes, are there other military factors, major factors to be considered in determining the possibility of an attack by the Japanese on this Territory?

"A. Yes. The Japanese can land commando raiders, espionage parties, in spite of any reasonable preventive efforts that we make. And in the information that they might possibly obtain would be—in my opinion—could be more injurious to our cause than if they came to these islands and established a beachhead on one of them. The information that they *might as* to prospective movements of our fleet, the presence of our fleet in these waters, or its absence, the deductions that might be made from the information they pick up mingling with the Japanese of the community might very well cause some of our operations in the far west, far westward of here, to be unsuccessful.

"Q. Well, in other words, do you agree with General Richardson's testimony that protection of these Naval operations to the westward from premature disclosure is a vital factor in your operations?

"A. It is of the utmost importance, and the security against espionage activity in these islands is of the utmost importance.

"Q. Admiral Nimitz, having in mind your duties here and your responsibility, and from your study of the situation, would you state whether or not, in your opinion, there is imminent danger of invasion of the Territory of Hawaii by the Japanese?

"A. Invasion by sea-borne troops in sufficient numbers to seize a bridgehead, no. I consider it neither imminent nor probable. But invasion by stealth, by submarine, commando raids, espionage parties, I consider it not only probable but imminent. It is constantly impending.

"Q. And what is your view on invasion by carrier-borne aircraft?

"A. I cited that in a previous answer, that it is possible, if the Japanese wish to take the risk; they have sufficient carriers and sufficient planes to make an attack on these islands similar to the one that they made on December 7th."

In considering the danger of surprise referred to by both the General and the Admiral, it should be noted that the testimony shows that an advantage of a few minutes may be decisive in modern warfare.[2]

The Supreme Court in Ex parte Milligan, 71 U.S. 3, was dealing with a situation in which Con-

[2] The report of the Navy Department of December 5, 1942, states that all the anti-aircraft guns of the naval vessels at Pearl Harbor were in action within seven minutes after the attack at 7:55 a.m.

gress had provided that the suspension of the writ should not be effective where there was a failure to indict the petitioner within a time fixed by statute. The case, therefore, dealt not with the effect of the suspension of the writ but rather with the right to try the petitioner by military tribunal during the period in which he was held by the military authorities. The Supreme Court held that the military authorities were without jurisdiction to try the petitioner and that the decision of the military court was void for that reason, the court holding that the situation did not justify the application of martial law in violation of the expressed will of Congress to the contrary. The court in that case divided upon the question of whether or not Congress, under the Constitution, could authorize trials other than by jury under the circumstances disclosed in that record. This decision will be of importance in weighing the effect of the judgment of the provost court in this case, a question which we hold is not before us.

Assuming as we do for the purpose of this opinion, without deciding, that the court can ignore an order suspending the privilege of the writ of habeas corpus as to persons held in custody by the military authorities when such suspension is so arbitrary, capricious and unreasonable as to justify an inference of fraud on the part of the military authorities, we hold that in view of the existence of a global war in which this nation is involved and from the facts shown in evidence in the court below, the

courts cannot say the decision of the military authorities or of the Governor of Hawaii to continue such suspension is so arbitrary, capricious or fraudulent as to justify the courts in ignoring the action of the military authorities and ordering the release of persons in their custody. The decision of the trial court based upon its own independent judgment of necessity for the continued suspension of the privilege of the writ of habeas corpus, while supported by direct evidence of a number of witnesses, including Governor Stainback, does not go far enough to sustain its order because it ignores the opinion of the military authorities to the contrary and does not find facts justifying its order. Without a finding of implied fraud on the part of the Governor and of the military authorities the decision cannot be sustained.

The appellees also claim that even if the writ of habeas corpus has been and now is suspended within the Territory of Hawaii, such suspension does not apply to the type of offense committed by the appellee. The appellees contend that: "The Constitution contemplates a suspension of the privilege of the writ only in cases of persons engaged in aiding the rebellion or invasion." The Constitution provides no such limitation and we see no reason for its application. Such an interpretation of the Constitution would leave open the question in every case as to whether or not the conduct of the persons detained by the military authorities came within the exception.

The decisions should be reversed and the trial court directed to return the appellees to the custody of the respective appellants.

Denman, Circuit Judge:

I concur in the orders for the discharge of the writs but dissent from deciding the constitutional question of the jurisdiction or power of the court to issue the writs. This is because the petitions for the writs on their faces fail to show the petitioners belong to the class of persons entitled to the constitutional privilege of the writ of habeas corpus—that is, those alleging their illegal imprisonment.[1] These clearly are cases in which should be applied the principle that, if possible, a case must be decided on other than constitutional grounds.

The constitutional question presented in the appellants' points on appeal in both cases is stated as follows:

"I. The pleadings[2] consisting of the petition

[1] 28 U.S.C.A. § 455. "Allowance and direction. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

[2] It is suggested the petitions become functus officio on the issue of the writs. It was stipulated in the Duncan case that the return to the order to show cause made before the writ was issued shall be deemed a return to the writ. In such a situation the issue is fixed by the petition for the writ and the return to the writ which here joins issue with

> for a writ, order to show cause why a writ should not issue, the return and answer to the petition, to the order to show cause and to the return, and the traverse disclose that the privilege of the writ of habeas corpus was lawfully suspended and martial law lawfully existed pursuant to public proclamations of the Governor of the Territory of Hawaii issued pursuant to the Organic Act of the Territory; . . ."

In Judge Wilbur's opinion the constitutional question so presented as to whether the military orders legally deprived the appellees of the privilege of the writ is not only entertained but decided in favor of the appellants. In Judge Healy's opinion it is assumed that the constitutional question is decided adversely to the appellants. If his excellent opinion could be construed as holding the constitutional question entirely ignored, I would concur in it.

It is my view that the petitions on their faces, taken in connection with facts judicially to be noticed, show no facts invoking the jurisdiction or

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the petition. Whitten v. Tomlinson, 160 U.S. 231, 242. Cf. Hammerer v. Huff, 110 F. 2d 113, 114-115 (C.A. D.C.). A similar stipulation was made in the White case, where the return to the writ also expressly admits some of the allegations of the petition and denies others, particularly its assertion that no danger of invasion existed. In no sense could it be said that the petition became functus officio on the issuance of the writ. I do not believe Barth v. Clise, 12 Wall. 400, 402 so holds. If it does, it is overruled by Whitten v. Tomlinson, supra.

power of the district court to issue the writs; that the court should have proceeded no further than to determine that it had no such power; and that it was error in both cases to proceed with hearings on the orders to show cause—all the more so to decide or assume the decision of the question of the existence of the right in the respective petitioners to the constitutional privilege of the writ.

Briefly stated, the fatal defects of the petitions in both cases are that they rest on the assertions, later more fully considered, that no danger of invasion actually existed at any pertinent times warranting the suspension of the writ, whereas there is no allegation of the sole fact necessary to sustain the petitions, namely, that at none of the pertinent times did the military authorities have reasonable grounds to believe the existence of such danger. As later discussed, the military could have such a belief though no such danger in fact existed. Incidentally, though it seems irrelevant, petitioners did not mend their holds by later pleading. No such allegation appears in the traverses to the returns to the orders to show cause.

Merely because persons are imprisoned does not prima facie give them the right to invoke the power of the court or judge to issue writs of habeas corpus in their behalf. Ex Parte Quirin, 317 U.S. 24. The class of persons to whom the constitutional privilege is extended consists of those "unlawfully de-

prived of their liberty."[3] The petitions on which the instant proceedings rest on their faces show the petitioners are imprisoned on judgments military in character, not unlawful when made nor since become unlawful. The petitions no more show the petitioners belonging to the class having legal interests entitling them to raise the question of the military orders denying to them their constitutional privilege of the writ, than the litigants in many cases have brought themselves within the class having legal interests entitling them to a decision of other constitutional questions. Chicago Board of Trade v. Olsen, 262 U.S. 1, 43; Blair v. United States, 250 U.S. 273, 279; Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 545; Municipal Investors v. Birmingham, 316 U.S. 153, 155.

White's petition fails to state a cause for the issuance of the writ. White's petition alleges that he was convicted by the Provost Marshal's court of the crime of embezzlement and sentenced to five years' imprisonment in Oahu Prison, where he is confined in the custody of appellant, respondent below. The conviction was on August 25, 1942, within three months of the Battle of Midway, in which engagement two or more large fleets of Japanese war vessels steaming toward the Hawaiian Islands were defeated near the Island of Midway. It could not be contended that there was no Japan-

[3] As stated in McNally v. Hill, Warden, 293 U.S. 131, 138, "Without restraint of liberty, the writ will not issue . . . Equally, without restraint which is unlawful, the writ may not be used."

ese Navy left for a second attempt to invade the Hawaiian Islands.

It is further alleged that on December 7, 1941, the Governor of Hawaii had declared martial law and authorized the Commanding General of the Hawaiian department and his subordinates to exercise the powers normally exercised by the judicial officers of the Territory. It is not contended that this order was invalid when made, Ex parte Zimmerman, 132 F. 2d 443, but a mere conclusion of law is stated "that said martial law ceased to exist legally in the Territory prior to said August 25, 1942, when he was tried as aforesaid before said Provost Court."

The petition does not and could not allege that the civil courts were open and functioning at the time of trial and sentence, but alleges no more than that they were able and ready to perform their normal functions and duties. As showing the fact supporting the legal conclusion that "martial law [had] ceased to exist legally," it is further alleged that no "such imminent danger of invasion by an enemy force existed as to warrant or justify the denial to petitioner of a trial and hearing before the proper courts in and of the Territory of Hawaii."

As stated, what makes the petition fatally defective[4] is the absence of any allegation that at the

[4] This court in Ex Parte Zimmerman, 132 F. 2d 442, 446, a case involving the same question, in holding that the petition failed to state facts em-

time of the trial and conviction on August 25, 1942, the military authorities had no reasonable ground to anticipate or believe that there was a danger of invasion or other military necessity requiring the exercise of all the judicial powers by the military and the denial of the exercise of any judicial power by the civil authorities.

All that is alleged is that in the after-wisdom of March 31, 1944, nineteen months later, no such danger of invasion or military necessity for the exercise by the military of judicial power over non-military offenses in fact existed on August 25, 1942. It is entirely possible that history will show that long before the petitions were filed the Japanese military authorities regarded the invasion of the Hawaiian Islands as impossible and never enter-

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powering the district court to issue the writ, stated the rule as

> ". . . It is true that the averments of petitions for this great writ are not scrutinized with technical nicety; but neither are they taken as importing something other than what they say. The courts, in circumstances like the present, ought to be careful to avoid the idle or captious inference."

The petition is not an inartificially drawn document prepared by a petitioner unskilled in the law, but the product of able members of the Honolulu bar. In my opinion, the reason for the absence of any allegation that, on August 25, 1942, the military could not reasonably have entertained the idea of a possible invasion for which they must be prepared and on guard, and thus bring the petition within the Hirabayashi case, infra, is because such responsible members of the bar knew such an allegation would be untrue.

tained it at any of the times pertinent to the issues of the petitions.

However, no such after-wise allegations, even if assumed to state the facts, can satisfy the requirement of the allegation of the absence of reasonable ground in the mind of the military commander to apprehend the likelihood of the need to prepare to resist and to resist such an invasion and of the need of such judicial control during such preparation and resistance. Hirabayashi v. United States, 320 U.S. 81, 94; Sterling v. Constantin, 287 U.S. 378, 399, 402.

Concerning the absence of written notice of the charge of embezzlement, I am in agreement with Judge Healy's statement. In addition no prejudice is shown and, since the evidence is not before us, we may assume that the petitioner himself testified to facts warranting his conviction. Likewise, I am in agreement with Judge Healy's statement regarding the absence of a jury and the character of martial as distinguished from the law of civil courts. White's petition on its face shows no ground for the issuance of the writ of habeas corpus and should have been dismissed on that ground alone.

Duncan's petition fails to state grounds to invoke the privilege of the writ of habeas corpus. Duncan was convicted on March 2, 1944, of having assaulted, on February 24, 1944, sentries at the main gate of the Pearl Harbor Reservation, while on the Reservation. Here I am in agreement with Judge Healy's statement. In addition judicial notice is taken that in time of war military necessity re-

quires the fullest respect be shown to all soldiers in uniform in the performance of their military duties, a fortiori to the Marine sentries guarding the entrance to Pearl Harbor with its fortifications subject to possible sabotage. Equally clear is the military necessity for prompt punishment by the military itself for the maintenance of its discipline and the self-respect of its members and for the command of that respect by civilians.

Duncan's petition contains allegations similar to those of White's petition concerning the absence of danger of invasion and the military necessity for such exercise of the judicial power by the military. Nowhere are the required allegations of absence of reasonable apprehension of invasion or the absence of reasonable belief of the military necessity for military adjudication of such an offense as assaulting the sentries as here committed. As stated, it affirmatively appears that such military necessity existed.

The petition for the writ should have been dismissed because stating no cause for the granting of the claimed constitutional privilege. It was error to proceed beyond this and permit the pleadings and proof and issuance of the writ which should have been discharged for no other reason than that last above stated.

Stephens, Circuit Judge, did not participate in the decision of these cases.

[Endorsed]: Opinions. Filed Nov. 1, 1944. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10763

DUKE PAOA KAHANAMOKU, etc.,
Appellant,

vs.

LLOYD, C. DUNCAN,
Appellee.

DECREE

Appeal from the District Court of the United States for the Territory of Hawaii.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Territory of Hawaii and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with directions to return the appellee to the custody of the appellant.

[Endorsed]: Decree. Filed and entered Nov. 1, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four volumes containing one thousand two hundred thirty-two (1232) pages, numbered from and including 1 to and including 1232, to be a full, true and correct copy of the entire record excluding certain original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of November, 1944.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 791

LLOYD C. DUNCAN,

Petitioner,

vs.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

J. GARNER ANTHONY,
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In the Supreme Court

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OCTOBER TERM, 1944

No.

LLOYD C. DUNCAN,
Petitioner,

vs.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Lloyd C. Duncan, petitioner, respectfully prays for a writ of certiorari to the United States Circuit Court

NOTE: For the pertinent provisions of the Constitution, the Hawaiian Organic Act and statutes, see Appendix (infra pp. i-iv).

of Appeals for the Ninth Circuit to review the final decree of said court entered November 1, 1944, reversing the judgment of the District Court of the United States for the Territory of Hawaii.

OPINIONS BELOW.

The decision of the District Court (R. 389) is not reported. The opinions of the Circuit Court of Appeals (R. 1188) are not reported to date.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the validity of the trial of a civilian residing in Hawaii who was charged, tried, convicted and imprisoned for a term of six months by a military tribunal for the alleged offense of assault and battery on a sentry stationed at a naval reservation, an offense made criminal under existing law[1] applicable in Hawaii.

The alleged offense for which petitioner was tried and convicted, was assault and battery upon naval personnel contrary to General Order 2:8.01 (R. 110). The offense, constituting as it did, an offense against both federal and territorial law and not involving any act hostile to the government or any act contrary to

[1] A conviction of assault and battery under federal law carries punishment ranging from twenty years in grave cases to three months for simple assault (R. S. 5346; 18 U. S. C. 455); conviction under territorial law carries punishment ranging from twenty years to six months' imprisonment (Revised Laws of Hawaii 1935, Ch. 166); the District Court has concurrent jurisdiction with the territorial courts in such cases (54 Stat. 304; 18 U. S. C. 451).

the law of war or any act contrary to the Articles of War was clearly within that class of offenses constitutionally triable only by a jury.

Petitioner's trial before a provost court at Pearl Harbor took place on March 2, 1944 at a time when the courts of the territory were in full exercise of their statutory powers, trying criminal and civil cases of every nature.

The District Court released the prisoner on a writ of habeas corpus holding the military trial invalid. The Circuit Court of Appeals reversed the judgment of the District Court and ordered the petitioner remanded to custody.

On December 7, 1941, after the Japanese attack on Pearl Harbor, J. B. Poindexter, Governor of Hawaii, by proclamation invoked Section 67 of the Hawaiian Organic Act (31 Stat. 153; 48 U. S. C. 532) suspended the privilege of the writ of habeas corpus and proclaimed martial law throughout the territory (R. 12). This action was approved by the President (R. 61). The Governor, however, in his proclamation went beyond the provisions of Section 67 of the Hawaiian Organic Act by purporting to delegate to the Commanding General the judicial power to try and punish civilians for violation of federal and territorial law. The text of the Governor's proclamation was neither submitted to the President nor approved by him, the President did approve the Governor's action suspending the writ of habeas corpus and placing the territory under martial law in accordance with Section 67 of the Hawaiian Organic Act.

On the same day General Short proclaimed to the people of Hawaii:

> "I have this day assumed the position of military Governor of Hawaii and have taken charge of the government of the Territory, of the preservation of order therein and of putting these islands in a proper state of defense (R. 59) * * *"

The self-styled "military governor" issued General Order No. 4 (R. 1194) erecting military commissions and provost courts for the trial of civilians:

> "For offenses against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authorities".[2]

On December 8, 1941, the civil courts of Hawaii were suppressed by order of General Short and army personnel moved in and took over the courtrooms, clerks' offices, clerks and facilities of the District Court of Honolulu (a court of limited jurisdiction) and other inferior courts throughout the territory for the trial of cases brought before the provost courts (R. 594-9).

On December 16, 1941, General Order No. 29[3] (R. 1194) relaxed the original order closing the civil courts and permitted them to operate to a limited extent in uncontested civil matters. Trial by jury in either civil or criminal cases or the subpoenaing of

[2] G.O.'s 1 to 181 covering the period December 7, 1941 to January 30, 1943 including G.O. 4, 29 and 57 referred to in the opinion of the court are Exhibit V in evidence which has not been printed; these orders were revoked on February 8, 1943 and new orders issued (R. 94 to 362).

[3] See ante n. 2.

witnesses was forbidden. A further modification was made by General Order 57 (R. 1194)[4] on January 27 which authorized the civil courts to entertain civil cases "as agents of the military governor". However the prohibition against trial by jury and the summoning of grand juries and the issuance of a writ of habeas corpus remained.

The trial of criminal cases of every description before military tribunals continued unabated from December, 1941 until after the appointment of District Judge Ingram M. Stainback, as governor of Hawaii on July 23, 1942. The new governor convinced that no necessity warranted the trial of civilians before military tribunals and also convinced that the creation of a military government over Hawaii without the authority of Congress was not only illegal but entirely unnecessary, proceeded to Washington to accomplish the restoration of civil government. There his negotiations with the War Department, Justice Department and the Department of the Interior (R. 880-4) resulted in a compromise and the issuance of his proclamation of February 8, 1943, which restored civil government (R. 14). General Emmons at the same time issued a similar proclamation as "military governor" of Hawaii (R. 77).

No public disorder has existed at any time in Hawaii since the outbreak of war, admittedly on the contrary, the conduct of the civil population has been exemplary (R. 583, 596, 664, 687, 746, 770, 821, 1140, 1143).

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[4]See ante n. 2.

Petitioner's trial took place on March 2, 1944, a year after the proclamation restoring civil government. The courts of the territory (federal and territorial) had been functioning for more than a year trying civil and criminal cases of every character. No military necessity existed for the military trial of a civilian for the alleged offense of assault and battery on military personnel and the finding of this fact by the District Court was supported by the overwhelming weight of the evidence. The act for which petitioner was charged was a violation both of territorial and federal law. He could have been charged and tried in the same manner as numerous other defendants had been charged and tried in Hawaii during the year before his military trial. The decree of the Circuit Court of Appeals in reversing the District Court for the Territory of Hawaii has decided an important question of constitutional and federal law contrary to the Federal Constitution, the Fifth and Sixth Amendments and Section 67 of the Hawaiian Organic Act.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on November 1, 1944. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. 347).

QUESTIONS PRESENTED.

The questions presented may be summarized:

(1) Did the provost court have jurisdiction to try, sentence and imprison petitioner, a civilian residing in Hawaii for an alleged offense which is not an offense against the law of war or the Articles of War, the alleged offense not involving any acts hostile to the government but constituting a crime under applicable federal and territorial law and the civil courts having jurisdiction over the subject matter being fully able to discharge their statutory powers?

(2) Was the privilege of the writ of habeas corpus suspended as to this case on April 20, 1944?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

This cause involves fundamental issues of civil liberties which go to the very root of our form of government. The Circuit Court of Appeals has reversed the judgment of the District Court and held that in time of war upon a proclamation of martial law, it was lawful to erect a military government over loyal American territory—a government in which the will of the commanding general and not the Constitution and laws of the United States was the supreme law of the land. The decision is without precedent in our history.

The court below has held that the authority entrusted by the Congress to the governor of Hawaii to suspend the privilege of the writ of habeas corpus and to proclaim martial law permitted the commanding

general to erect a "total military government" in Hawaii.

The decision below is contrary to controlling decisions of this Court.

Ex parte Milligan, 4 Wall. 2 (1866);
Sterling v. Constantine, 287 U.S. 378 (1932);
Ex parte Quirin, 317 U.S. 1, (1942).

The decision below deprives the petitioner of the right of trial by jury and indictment by grand jury contrary to the provisions of the Fifth and Sixth Amendments to the Federal Constitution. If permitted to stand this decision will remain a precedent authorizing the complete suppression of civil government in time of war after a declaration of martial law and the substitution of military trials for jury trials in that class of offenses which are traditionally and constitutionally triable only by jury.

The court below misinterpreted the opinion of this Court in the case of *Hirabayashi v. United States*, 320 U.S. 81 (1943). There this Court held that a military order authorized by Act of Congress was enforceable in the federal courts. The court below considered the *Hirabayashi* case authority for holding that a military order could be enforced in a military court without statutory authority.

A military tribunal is without jurisdiction to try a civilian for an offense against the general law applicable in the territory which is neither an offense against the Articles of War or the law of war or which does not involve an act hostile to the United States, so long as the courts, federal and territorial,

are discharging their statutory powers and no obstacle exists to a lawful prosecution in said courts. The offense for which petitioner was tried was within the class of offenses constitutionally triable only by jury, therefore his trial in the provost court being contrary to the Fifth and Sixth Amendments was void.

The Federal Constitution and particularly the first ten amendments are applicable to Hawaii having been expressly extended to the territory by Act of Congress (31 Stat. (1900) 141, 48 U.S.C. 495). Section 67 of the Hawaiian Organic Act does not have the effect of depriving the inhabitants of the territory of their constitutional rights, particularly the right of trial by jury nor does it permit the jurisdiction of military tribunals to be exercised over civilians in causes which military tribunals could have no jurisdiction in like circumstances within the states of the United States.

The military orders purporting to authorize petitioner's trial were not authorized or approved by either the governor or the President. No act of the Congress authorized the military trial of petitioner. No act of the Congress authorized the creation of a military government in Hawaii. The decision of the court below holding that the congressional authority given the governor to proclaim martial law authorized "total military government" is a distortion of the words of the Hawaiian Organic Act. Congress did not authorize the governor to surrender his statutory duties as chief executive to the commanding general nor did it authorize the governor to delegate judicial powers to the commanding general.

The court below has confused the power to arrest and detain persons suspected of being hostile to the government with the power to try and punish loyal citizens for violations of ordinary municipal law.

Neither Article I, Section 9 of the Federal Constitution nor Section 67 of the Hawaiian Organic Act contemplate any general suspension of the privilege of the writ of habeas corpus in all cases. The purpose of Article I, Section 9 of the Federal Constitution and the purpose of Section 67 of the Hawaiian Organic Act was to permit the detention of persons who might be hostile to the government. These provisions were never intended to prevent a judicial review or the release of a citizen tried before a military tribunal for an offense of the class constitutionally triable only by jury.

This cause involves the fundamental question whether in time of war after a declaration of martial law with the courts open and in the complete exercise of their statutory powers the right of trial by jury is to be scrapped and military trials substituted in that class of cases which traditionally and constitutionally are triable only by jury. The decision below in effect holds that the will of the commander, not the Constitution and laws of the United States, is the supreme law of the land. It is not only without precedent in our judicial history but embodies a principle contrary to the very genius of our form of government. A review and determination of this case by this Court will settle constitutional issues of first importance.

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that court to certify to and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled in its docket as "No. 10763, Duke Paoa Kahanamoku, etc., Appellant v. Lloyd C. Duncan, Appellee" and that the decree of said court be reversed by this Court and that the judgment of the United States District Court for the Territory of Hawaii be affirmed.

Dated, Honolulu, Hawaii,
December 27, 1944.

LLOYD C. DUNCAN,
Petitioner.

By J. GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendix Follows.)

Appendix

Constitution of the United States

Art. I, Sec. 9, Cl. 2:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Amendments

Article V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

his favor, and to have the assistance of counsel for his defense."

Hawaiian Organic Act

"Sec. 5. The Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States * * *" (31 Stat. (1900) 141, 48 U.S.C. 495).

"Sec. 66. The executive power of the government of the Territory of Hawaii shall be vested in a governor who shall be appointed by the President by and with the advice and consent of the Senate of the United States, * * *" (31 Stat. (1900) 153, 48 U.S.C. 531).

"Sec. 67. The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known" (31 Stat. (1900) 153, 48 U.S.C. 532).

Sec. 276:

"Whoever shall assault another with intent to commit murder, or rape, shall be imprisoned not more than twenty years. Whoever shall assault another with intent to commit any felony, except murder, or rape shall be fined not more than $3,000, or imprisoned not more than ten years, or both. Whoever, with intent to do bodily harm, and without just cause or excuse, shall assault another with a dangerous weapon, instrument, or other thing, shall be fined not more than $1,000, or imprisoned not more than five years, or both. Whoever shall unlawfully strike, beat, or wound another, shall be fined not more than $500, or imprisoned not more than six months, or both. Whoever shall unlawfully assault another, shall be fined not more than $300, or imprisoned not more than three months, or both" (R.S. sec. 5346, Mar. 4, 1909, c.321, sec. 276, 35 Stat. 1143).

Sec. 272, Amended:

"Third. When committed within or on any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building" (June 11, 1940, c. 323, 54 Stat. 304, 18 U.S.C. 451).

Ch. 166, as amended:

"*Sec. 5653. Assault with intent to murder, maim or disfigure.* Whoever shall assault another, with intent to murder, or to maim or disfigure his person in any of the ways mentioned in the preceding section, shall be judged guilty of assault in the first degree, and shall be punished by a fine not exceeding one thousand dollars, and imprisonment at hard labor not more than five years."

"*Sec. 5654. Assault with dangerous weapon with intent to commit certain felonies.* Whoever, being armed with a dangerous weapon, shall assault another, with intent to commit any offense punishable by death, imprisonment for life, or imprisonment for twenty or more years, for the punishment of which assault no special provision is otherwise expressly made, shall be punished by imprisonment at hard labor not more than twenty years" (S.L.H. 1935, p. 174).

"*Sec. 5659. Assault; punishment.* Whoever shall commit an assault upon another, for which no other penalty is prescribed by law, shall be punished by a fine of not more than one hundred dollars or by imprisonment not more than six months."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 14

LLOYD C. DUNCAN,
Petitioner,

vs.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,
Respondent.

BRIEF FOR LLOYD C. DUNCAN, PETITIONER.

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A Manual for Courts-Martial, U. S. Army (1928) 42
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Basic Field Manual—Rules of Land Warfare FM 27-10 281, 283 42
Biennial Report of the Chief of Staff of the United States Army (1943) 14; House Document No. 288, 78th Cong. 1st Sess. 8
Binney, The Privilege of the Writ of Habeas Corpus Under the Constitution (2d ed. 1862), Third Part 37 44
Birkheimer, Military Government and Martial Law (3d ed. 1892) 23, 25, 42

Carr, A Regulated Liberty (1942) 42 Col. L. Rev. 339 30
33 Congressional Record (1900), 56th Cong. 1st Sess. p. 1919 32
Cramer (1943), 29 A.B.A.J. 368 42

Dicey, Law of the Constitution (8th ed.) 18

Farrand, Records of the Federal Constitutional Convention (1911) 44

Holdsworth, Martial Law Historically Considered, 18 L.Q. Rev. 117 18

Pages

Hurd, a Treatise on the Right of Personal Liberty and the Writ of Habeas Corpus (2d Ed. 1876) 44

King, "The Legality of Martial Law in Hawaii", 30 Calif. L. Rev. 599 (1942) 40

Kuyendall, Constitution of the Hawaiian Kingdom (1940) Papers of the Hawaiian Historical Society, Number 21.. 31

Lieber, The Justification of Martial Law (1898) 3..... 42

Lind, The Japanese in Hawaii Under War Conditions (1943), American Council Institute of Pacific Relations... 10

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Pollock, What is Martial Law, 18 L.Q. Rev. (1902) 152.... 18

Report on the Navy and the War, 78th Cong (1943), 1st Sess., Senate Document No. 107, p. 15..... 8

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Stern, Life and Writings of Abraham Lincoln (Mod. Lib. ed.), 760 44

Thurston, The Fundamental Law of Hawaii (1904), 194, 201 32

Wiener, A Practical Manual of Martial Law (1940)..... 18, 19, 42

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BRIEF FOR LLOYD C. DUNCAN, PETITIONER.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals[1] for the Ninth Circuit is reported in 146 Fed. (2d) 576. The opinion of the United States District Court for Hawaii is not reported but is found in the record at pages 389 to 402.

[1]The Circuit Court of Appeals decided this case together with the companion case of *White v. Steer* (No. 15, October 1945 Term) in one opinion embracing both cases; references to *White v. Steer* in this brief will be indicated thus: (White R.).

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on November 1, 1944. The petition for certiorari was filed in this Court on January 13, 1945 and certiorari was granted on February 12, 1945.

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code as amended by the act of February 13, 1925. (28 U.S.C. 347.)

STATEMENT OF THE CASE.

This case involves the validity of the trial of a civilian residing in Hawaii who was charged, tried, convicted and imprisoned for a term of six months by a provost court for the alleged offense of assault and battery on two fully armed marine sentries stationed at Pearl Harbor, a naval reservation in Hawaii.

On the evening of February 24, 1944, petitioner, a shipfitter employed at Pearl Harbor, entered the main gate to report to his job accompanied by a friend, a merchant seaman. While waiting for the latter's transportation to his ship, petitioner had words with two of the marine sentries stationed at the gate, a quarrel ensued and the petitioner was arrested by the marines, taken into custody and released the following day. (R. 519.)

On March 2, 1944, he was brought before a provost court at Pearl Harbor presided over by a naval officer and there tried and convicted of the offense of assault and battery on the two sentries and sentenced to six

months' imprisonment in the city and county jail. (R. 11.)

At the time of petitioner's provost court trial and for months prior thereto the courts of Hawaii ordained by law were in the full exercise of their judicial powers, trying civil and criminal cases of every nature.

The District Court on April 20, 1944, held the provost court trial invalid and released the prisoner on a writ of habeas corpus. (R. 403.) The Circuit Court of Appeals reversed the judgment of the District Court and ordered petitioner remanded to custody.

The institution of martial law.

In order to present the case in its proper setting we will summarize some of the main facts relating to the establishment of martial law in Hawaii.

On December 7, 1941, after the attack on Pearl Harbor the governor invoked the Hawaii Defense Act.[2] Later on the same day he suspended the privilege of the writ of habeas corpus and proclaimed martial law throughout the territory pursuant to Section 67 of the Hawaiian Organic Act.[3]

The governor advised the President that he had suspended the privilege of the writ of habeas corpus and proclaimed martial law in Hawaii and his action was approved by the President by cable. (R. 61-2.)

---

[2]Spec. S. L. Haw. 1941, Act 24. The Hawaii Defense Act regulations promulgated pursuant to this Act are in evidence as Exhibit M which has not been printed; the proclamation of the governor invoking the Defense Act is reproduced in the appendix.

[3]31 Stat. (1900) 153; 48 U.S.C. Sec. 532.

The governor in his proclamation not only suspended the privilege of the writ of habeas corpus and proclaimed martial law as he had advised President Roosevelt but went further:

> "And I do hereby authorize and request the Commanding General, Hawaiian Department, during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor;
>
> "And I do further authorize and request the said Commanding General * * * during the present emergency and until the danger of invasion is removed to exercise the powers normally exercised by judicial officers and employees of this Territory * * *." (R. 57.)

The text of the governor's proclamation was never approved by President Roosevelt and it is doubtful if he ever saw it. (White, R. 58.) Immediately following the governor's proclamation, Lt. General Walter C. Short issued a proclamation:

> "I announce to the people of Hawaii that in compliance with the above request of the Governor of Hawaii I have this day assumed the position of military governor of Hawaii and have taken charge of the government of the territory * * *.
>
> "I shall therefore shortly publish ordinances governing the conduct of the people of the territory with respect to the showing of light, circulation, meeting, censorship, possession of arms, ammunition and explosives, the sale of intoxicating liquors and other subjects.

"In order to assist in repelling the threatened invasion of our island home good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function." (R. 59, 60.)

General Short's proclamation indicates that it was his intention to administer martial law in the territory along orthodox lines, i.e., that the "ordinances" which he forecast promulgating would have some basis in military necessity to resist the "threatened invasion".

Lt. Colonel Thomas H. Green who became the executive officer under the self-styled "military governor" did not share this view. He set up a system for the administration of military justice to punish civilians as the provost courts thought fit without regard to the limitations of statutes of the territory or of the United States or any provision of the Federal Constitution. (General Orders No. 4.)[4]

On December 8, 1941, the courts of Hawaii ordained by law were suppressed by order of General Short and army personnel moved in, took over the courtrooms, clerks' offices, clerks and facilities of the police court of Honolulu and certain other courts of limited jurisdiction throughout the territory for the trial of cases before army officers sitting as provost court judges.

[4]General Orders 1 to 181 covering the period December 7, 1941 to January 30, 1943 are in evidence as Exhibit V which has not been printed. G. O. No. 4 is reproduced in the appendix.

(R. 594-9.) Evidently concluding that certain business had to be done by the courts established by law, the commanding general on December 16, 1941, issued General Order 29 (R. 1194) which relaxed the original order forbidding the courts of the territory to operate and permitted them to function in certain uncontested civil matters. However, trial by jury and the subpoenaing of witnesses was forbidden under pain of conviction and imprisonment by military tribunals. A further modification was made on January 27, 1942 by General Order No. 57 (R. 1194) which authorized the courts created by law to entertain certain civil cases "acting" as agents of the "military governor". The prohibition against trial by jury, the summoning of grand juries and the issuance of the writs of habeas corpus remained.

The trial of criminal cases of every description before military tribunals continued unabated from December 8, 1941, until after the appointment of United States District Judge Ingram M. Stainback as governor of Hawaii on July 23, 1942. The newly appointed governor convinced that no necessity warranted the trial of civilians before military tribunals and that the erection of a military government over Hawaii without authority of Congress or the President was not only unlawful but unnecessary, proceeded to Washington to accomplish the restoration of civil government in Hawaii. There he negotiated with the War Department, Jusfice Department and the Department of the Interior. (R. 880-4.) The negotiations resulted in a compromise avoiding taking the

issue to the President. The compromise was contained in the proclamation of the governor, February 8, 1943, which substantially restored civil government. (R. 14.) General Emmons at the same time (without any statutory authority) issued a similar proclamation as "military governor of Hawaii" by which he "relinquished" to the governor, other officers of the territory and the federal court "full jurisdiction" over certain enumerated subject matters. (R. 77.) Martial law was formally terminated by President Roosevelt on October 24, 1944, by proclamation No. 2627. (9 F. R. 12831.)

The military situation.

There is no dispute in the record that the threat of invasion which existed in the early days following Pearl Harbor had disappeared over a year prior to petitioner's trial in the provost court. As a matter of history the Japanese aggression had been stopped at the Battle of Midway in June of 1942. As reported by General Marshall the Battle of Midway marked the highpoint in enemy aggression and threats in the Pacific and from that time on the enemy was turned back with punishing losses.[5] Major General Hale, in command of the Seventh Air Force based in Hawaii, writing in the Army and Navy Register for March, 1944, gave his professional opinion that the threat of invasion of Hawaii was lifted after the Battle of Midway. (R. 670.) At the time of petitioner's trial

[5]Biennial Report of the Chief of Staff, U. S. Army (1943) House Document No. 288, 78th Cong. 1st Sess. 14, 30; see also Report on the Navy and the War, 78th Cong. (1943) 1st Sess., Senate Document No. 107, p. 15.

(March 2, 1944) the battle line had been thrust thousands of miles west of Hawaii. Occupied Kiska and Attu had been recovered; the Solomon Islands campaign had been completed; the Gilbert Islands were occupied by our forces. (R. 630); the Marshall Islands, 2400 miles west of Hawaii were under command of Admiral Nimitz (R. 748.) and our forces were attacking Palau, 3600 miles southwest of Hawaii and the Mariannas as a prelude of the invasion of those groups which followed shortly. (R. 611-614.)

Admiral Chester W. Nimitz, commander in chief, United States Pacific Fleet and Pacific Ocean Areas (now Fleet Admiral), made it quite clear that an invasion of Hawaii in any accepted sense was out of the question. He testified:

> "Invasion by seaborne troops in sufficient number to seize a bridgehead, no. I consider it neither imminent nor probable."

and then Admiral Nimitz added:

> "But invasion by stealth, commando raids, espionage parties, I consider it not only probable but imminent."

and that it would be possible for the enemy to send planes over Hawaii "if the Japanese wish to take the risk." (R. 1078.)

General Richardson agreed with Admiral Nimitz as to the impossibility of invasion. His opinion was that the enemy was totally incapable of such a threat, "the time for that is past", but that it was possible that Hawaiian waters could be visited by enemy sub-

marines or that the enemy might attempt an air raid on Hawaii. (R. 1030.)

The conduct of the civil population.

Whatever conclusion is reached in regard to state of readiness of the military establishments in Hawaii on December 7, the civil community was fully prepared. Long prior to December 7, the civil community convinced that war was inevitable had devised elaborate plans consisting of volunteer policemen, organized and trained medical groups as well as hospital units. (R. 664-665.) These were completed a year prior to the outbreak of war. The legislature was called into special session in 1941 and enacted the Hawaii Defense Act depositing extraordinary power in the governor of Hawaii to meet any emergency. General Short had urged the enactment of this law before the Senate of Hawaii to avoid the confusion of martial law.[6]

On December 7, the civil emergency agencies prepared as they were sprang to action in a single effort. The Office of Civilian Defense enrolled 27,000 volunteer workers. (R. 665.) The entire population was fingerprinted and given identification cards under the Defense Act. Air raid stations, first aid stations and evacuation centers were staffed and ready. Businessmen formed volunteer groups for military training on each island. (R. 666.)

Since December 7, there has been no civil strife, commotion or disorder. Governor Stainback testified

[6]Minutes, Senate Committee as a Whole, September 17, 1941.

that the conduct of the civil community was "admirable from every standpoint" (R. 821, 583, 596), and the high naval and military command agreed. (R. 664, 746, 747, 769, 770, 1140, 1141, 1143.)

Hawaii is one American community where racial and religious tolerance is a social norm.[1] The population of Hawaii is cosmopolitan, one-third consisting of persons of Japanese descent. Upon the outbreak of war the Hawaii Territorial Guard was called into service by the governor. In their ranks were Americans of Japanese descent. The Guard discharged the responsibilities of guarding important docks, public utilities and other vital installations during the first two months of war but were then inactivated by order of the Commanding General. (R. 1109.) One group from the University organized itself as Volunteers, tendered their services to General Emmons and were detailed to the 34th Combat Engineers. After eleven months' service they were permitted to enlist in the Army. (R. 1136.) When it became known that although excluded from the draft, volunteers would be taken, 10,000 volunteered to form the 442d Combat Team, which later invaded Sicily and helped take the beaches at Salerno. (R. 658, 661.)

The record of the 100th Battalion (a former Hawaii National Guard unit, consisting of Americans of Japa-

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[1] And, *The Japanese in Hawaii Under War Conditions* (1943), American Council Institute of Pacific Relations; see also, *A Report of an Investigation and Study of the Subject of Statehood and Other Subjects Relating to the Welfare of The Territory of Hawaii* (1938), Senate Document No. 151, 75th Congress, 3rd Session.

nese ancestry) led the War Department to reverse its prior ruling excluding Americans of Japanese ancestry from the draft. (R. 656.)

The rumors of subversive or fifth column activities among the Japanese in Hawaii have no basis in fact. This is made clear by the evidence of Colonel Kendall J. Fielder, in charge of military intelligence of the United States Army, ever since the outbreak of the war. Colonel Fielder states:

> "Having been in charge of military intelligence activities since June, 1941, I am in a position to know what has happened. There have been no known acts of sabotage, espionage or fifth column activities committed by the Japanese in Hawaii either on or subsequent to December 7, 1941". (R.687.)

The courts.

The civil courts of Hawaii were opened and doing business on the Monday following the attack on Pearl Harbor but were closed on that day by order of the Commanding General. It is undisputed in the record that at all times the civil courts have been ready, willing and fully able to discharge their duties prescribed by law. Since December 7, 1941, the district court of Honolulu (a court of limited criminal and civil jurisdiction) handled 69,582 criminal cases and 2641 civil cases. In 1942 this Court tried 969 civil cases, 15,011 criminal cases. In 1943 it handled 1240 civil cases and 43,775 criminal cases and in the first three months of 1944, 11,796 cases. (R. 592, 593.) The business of the Supreme Court of Hawaii and the Circuit Courts,

(courts of record) for the years 1939 to 1943 is summarized in Exhibit "H". (R. 682.)

The records of the Court which tried this case show that it has never been closed but has been sitting continuously handling a large volume of business including the usual run of civil and criminal cases. The Courts of Hawaii have been functioning at all times since the war, limited only by restrictions placed upon them by military orders.

Judge Albert M. Cristy, the senior judge of the Circuit Court, a graduate of Brown University and the Harvard Law School, having held office since 1926, testified that immediately after the attack the judges desiring to assist the military authorities made suggestions as to the conduct of business, continuance and settings but without success. (R. 601.) Judge Cristy testified that the business of the Court in 1943 was the same as before the war and that there was no reason whatsoever why any criminal case could not be tried in the Courts of the territory (R. 602), that there was no disorder in the community and that the only obstacle to the Courts exercising full jurisdiction was the command of military orders and that no reason or necessity existed for curtailing the activities of the Courts. (R. 604.) Judge Steiner, whose courtroom was taken over by the provost courts on the outbreak of war and retained by the Army until September, 1942, testified from his daily observation of the provost courts in action that he saw no case that could not have been handled by his Court had the military authorities permitted it. (R. 596.)

Transportation to and from Hawaii.

Since the outbreak of war Hawaii (as might be expected) has been closely linked with the mainland and the South Pacific by surface and air transportation. In 1942, inbound commercial tonnage by surface was 993,797 tons and in 1943, 1,010,437 tons. Commercial shipments out of the territory during the same two years were 1,310,469 tons and 1,542,769 tons. Civilian passengers entering the territory by surface vessels from January 1, 1942, to March 31, 1944, was 23,492; outbound civilian passengers totaled 31,626. Hundreds of merchant ships had cleared the port of Honolulu since December 7, 1941. None had been sunk in the years 1942, 1943 and 1944, but a few attacked. (R. 698.) The rate of marine insurance on merchandise shipped between the Pacific coast and Hawaii was $5.00 per $100.00 of insurance on December 10, 1941, but by December 9, 1943, had dropped to 50¢ per $100 of insurance. (R. 692.)

The years of 1942, 1943 and 1944 witnessed a most comprehensive coverage of the Islands of the Pacific by cargo and passenger aircraft. Thousands of routine flights were completed between Honolulu and the mainland ("a considerable number of flights daily"), the Islands of the South Pacific, New Zealand and Australia. The network of airlines also included Midway, Solomon Islands, Gilbert Islands, Society Islands and New Guinea. (R. 698-9.)

The record discloses no necessity for provost courts.

Governor Stainback, Judge Cristy and Judge Steiner all testified that there was no need for the trial

of civilians in the provost courts. (R. 820,826-8, 602-5, 596.) Admiral Nimitz, the Commander in Chief, gave no testimony on the subject. General Richardson gave several reasons as to why he thought the provost courts were desirable. He testified "in order to enforce those regulations I must have at my disposal some sort of tribunal to that effect". (R. 1027.) He considered eliminating them, decided against that course because the violations of military orders were not offenses against territorial or federal law. The trial of civilians in a civil court he thought would be objectionable because of "its concomitant delay" and the military authorities "cannot brook a delay". (R. 1028.)

The enforcement of his orders in a federal court under executive order 9066 he found equally objectionable because this would subject him "to all sorts of influences political and otherwise as happened in the cases on the east coast both in Philadelphia and Boston" and that "it is inconceivable that the military commander should be subjected for the enforcement of his orders to the control of other agents". (R. 1029.)

General Richardson admitted that he was unfamiliar with the courts of Hawaii and had no knowledge of any delays (R. 1051), he saw no distinction between his mission as a soldier in Hawaii and his political mission (R. 1052, 1068), but he conceded that the need for the existence of a military tribunal to enforce the Commanding General's orders in Hawaii was no greater than the need for such a tribunal in California, Maryland or Pennsylvania. (R. 1056-7.)

ERRORS RELIED ON.

The Circuit Court of Appeals erred:

(1) In ruling that the provost court had jurisdiction to try, sentence and imprison petitioner, a civilian not connected with the armed forces, for the alleged offense of assault and battery upon naval personnel contrary to General Orders No. 2, 8.01.

(2) In failing to rule that the privilege of the writ of habeas corpus was not suspended on April 20, 1944, as to this case.

SUMMARY OF ARGUMENT.

(1) The provost court is without jurisdiction to try a civilian for an offense against the general law applicable in the territory which is neither an offense against the Articles of War or the law of war so long as the Courts are discharging their statutory powers and no obstacle exists to a lawful prosecution in such courts. The offense for which petitioner was tried was within the class of offenses constitutionally triable only by jury. Therefore his trial in a provost court being contrary to the Fifth and Sixth Amendments was void.

(2) "Martial law" authorized by Section 67 contemplates the exercise of executive power based upon military necessity. The trial Court on the basis of clear and convincing evidence found as a fact that no necessity existed for provost courts on March 2, 1944. The Circuit Court of Appeals without reference to any factual justification held that paragraph 8.01 of Gen-

eral Orders No. 2 was "reasonable" and that since the order was not enforceable in the civil courts concluded that it must be enforceable some place and therefore the trial in the military courts was valid. The fact that the military authorities chose to ignore the ample statutory means of promulgating and enforcing military regulations in the federal courts which the Congress had afforded (56 Stat. (1942) 173; 18, U. S. C. 97-a) is no basis for concluding that the military authorities may promulgate regulations and enforce them in military courts which Congress has not authorized.

(3) The court below held that Section 67 of the Hawaiian Organic Act authorized the governor to turn over all executive, legislative and judicial powers to the commanding general and to erect a "total military government" in Hawaii "under exclusive military rule". This is a manifest distortion of the words of Section 67. The language of the act authorizes no such delegation. If it did the section would be contrary to the Fifth and Sixth Amendments.

(4) The suspension of the privilege of the writ of habeas corpus under the Federal Constitution and under Section 67 of the Hawaiian Organic Act is not, and historically never has been, a general suspension applicable to all cases. The suspension of the privilege of the writ is limited to persons hostile to the Government. Hence irrespective of the termination of martial law petitioner was entitled to his release on habeas corpus.

ARGUMENT.

I.

THE JURISDICTION OF MILITARY TRIBUNALS DOES NOT EXTEND TO CIVILIANS EXCEPT FOR OFFENSES UNDER THE ARTICLES OF WAR OR AGAINST THE LAW OF WAR SO LONG AS CIVIL COURTS ARE ABLE TO EXERCISE THEIR STATUTORY AND CONSTITUTIONAL FUNCTIONS.

From the statement of the case and the evidence in the record it is clear at the time of the trial of petitioner on March 2, 1944, all of the civil courts of Hawaii were fully able to perform their normal duties; that under identical facts and circumstances existing in any of the states a martial law tribunal would have been without jurisdiction either over the person of the petitioner or the subject matter; that if the military tribunal has jurisdiction in this case it must be posited on some disability that attaches to the residents of a territory as distinguished from the residents of a state. In the first part of this brief we will attempt to analyze the basis upon which martial law tribunals in general assert jurisdiction over civilians so as to be able to determine whether there is any basis upon which Hawaii may be accorded discriminatory treatment in this connection under the Federal Constitution.

(1) The exercise of jurisdiction by a martial law tribunal over a civilian can only be justified by urgent necessity.

It must be conceded that the exercise of any power under martial law is based upon necessity. This prin-

ciple is well settled in Anglo-American jurisprudence[1] and has been authoritatively decided by this Court.

Ex Parte Milligan, 4 Wall. 2, 142 (1866);
Mitchell v. Harmony, 13 How. 115, 134 (1851);
Sterling v. Constantin, 287 U. S. 387, 400 et seq. (1932).

The writers on military law are in accord with this view.

2 Winthrop's *Military Law and Precedents* (1896) 1279, 1280.

"Its limitations. The employment of martial law has been likened to the exercise of the right of *self-defense* by an individual. Its occasion and justification thus is necessity. * * *

"It is a further principle that while martial law is not to be inaugurated precipitately or inconsiderately so it is to be *continued* only so long as the public exigency on account of which it was declared shall prevail. It is not, indeed, essential to the discontinuance of such state that the original declaration of the same be formally *revoked*. When the emergency has ceased, or within a reasonable interval thereafter, the status may be deemed to have lapsed, and cannot lawfully be further continued or enforced."

A terse statement of the matter appears in Wiener, *A Practical Manual of Martial Law* (1940) p. 16:

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[1] Holdsworth, *Martial Law Historically Considered*, 18 L.Q. Rev. (1902) 117;
Pollock, *What is Martial Law?* 18 L. Q. Rev. (1902) 152;
Dicey, *Law of the Constitution* (8th Ed. 1920), 280, 538.

"19. Fundamental Principal of Martial Law. —Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed. That necessity is no formal, artificial, legalistic concept but an actual and factual one; it is the necessity of taking action to safeguard the state against insurrection, riot, disorder, or public calamity * * *."

In amplification of the general principles Wiener shows in his valuable manual that in domestic disturbances within the United States (barring, perhaps, only the years 1861 to 1865) the employment of federal troops "has never yet included the trial and punishment of civilian offenders by military tribunals".[9] It is also clear that a proclamation of martial law, whether by civilian authority or the military commander, is merely evidence to be considered in determining whether the particular exercise of military power is justified, but that such proclamation is not necessary as a condition precedent, nor is it conclusive, as to the necessity, and it certainly does not make lawful the exercise of powers depending upon martial law not justified in fact by necessity.

The provost court which acted in the case at bar was not constituted by an Act of Congress. Its existence and the limit of its jurisdiction as to persons and offenses must be based solely on the common law of war. It is not contended in this case that the peti-

[9]Wiener, Op. Cit., supra, p. 103.

tioner is a "person subject to military law" as this phrase is used in Article 2 of the Articles of War (10 U.S.C. Sec. 1473), or that the military tribunal that sentenced the petitioner is a "court-martial" as constituted by Article 3 of the Articles of War. (10 U.S.C. 1474 et seq.) Consequently if the marital-law tribunal had jurisdiction, it would first be necessary to show wherein the decision in *Ex Parte Milligan* is inapplicable. Even if it be now assumed (as is not conceded) that the reasoning of the minority in this decision should prevail; that is, that Congress is constitutionally authorized to create military tribunals with authority to try civilians for alleged crimes "against the security and safety of the national forces" should Congress determine as a matter of policy that the same were proper, it is sufficient to point out that in the case at bar Congress has not directed the creation of such military tribunals[10] and furthermore that martial-law tribunals operating in the Territory exercised jurisdiction in matters that are not necessarily related to the "security and safety of the national forces".

Stated another way, there is some evidence in this case which would form the basis of an argument to the Congress that military tribunals should be created in Hawaii by congressional action so that in all matters relating to military operations in this important island base there could be the greatest directness. This is

[10]The argument of the Government that Sec. 67 of the Hawaiian Organic Act supports the creation of such tribunals is answered in the second part of this brief.

precisely what Congress did in the case of certain islands of the Pacific other than Hawaii.[11] It is presumed, however, that if Congress deemed such action necessary or expedient it would adequately safeguard the rights of affected civilians by providing for limited jurisdiction, limited penalties and adequate review, as well as guaranteeing that the fundamentals of fair trial should in no event be withheld; and the congressional determination of the necessity for such trials outside the constitutional guarantees, would be subject to constant judicial scrutiny to ascertain whether the necessity continued which justified the deprivation of a civil trial.

The court below held that because the military orders here challenged were not by their terms enforceable in the civil courts they must be enforceable in military courts.

> "The power to punish infractions of military regulations of this type must of necessity reside somewhere. If it has not by legislation or municipal ordinance been delegated to the ordinary courts or made subject to the authority of the civil police, the power perforce must exist in the military arm of the government acting through the medium of commissions or like tribunals." (R. 1207.)

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[11] Act of March 22, 1943, 57 Stat. 41; 34 U.S.C. Sec. 1201; the previous year on March 21, 1942, Congress enacted the "military area" statute (56 Stat. 173). General Order 7 recites that on October 16, 1942 pursuant to Executive Order 9066 General Emmons had designated Hawaii as a military area (R. 161) but despite this designation military orders were enforced in military courts not in the federal court as Congress had directed.

This is a complete *non sequitur*. The Congress by the Act of March 21, 1942 (56 Stat. 173) clothed the military arm with sweeping powers to promulgate military regulations with the only limitation that they should be enforced in the federal courts. Under this statute the power vested in the military arm of government was so vast that 70,000 American citizens were removed from their homes on the West Coast and confined in relocation centers (*Korematsu v. United States*, 323 U. S. 214) in the interior with the approval of this Court. It is idle to say there was any dearth of power, or that the Congress had not "delegated" enforcement of military regulations "to the ordinary courts". Because a commanding general disdains the use of the statutory framework erected by Congress affords no legal justification for erecting tribunals of his own for the enforcement of his orders.

This Court's recent paraphrasing of the *Milligan Case* in *Ex Parte Quirin*, 317 U. S. 1, could well be applied to the petitioner—"not being a part of or associated with the armed forces of the enemy, (he) was a non-belligerent, not subject to the law of war, save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established".

It is not easy to distill out of the cases and material bearing on the subject a clear statement of the principles that are to be applied in determining when—if ever—military necessity justifies the subjugation of civilians to punitive justice administered by a martial-law tribunal. But the most ardent advocate of the use of military power concedes that such tribunals sit

only because of "an imperious necessity".[12] A consideration of the nature of the operations of such tribunals demonstrates the overwhelming social desirability of limiting their use to situations where resort to constitutional courts is virtually impossible. Such tribunals are frequently presided over by persons who have no knowledge of or association with the judicial tradition as the same is understood by civil courts; their procedure is governed by military custom, plus such rough guides as are included in the general orders of the military commander; they attempt to mete out justice in an atmosphere in which haste seems far more important than exactness. A general description of the differences between the two types of courts as stated by Birkheimer illustrates the point:

> "The former (military tribunals) essay to mete out substantial justice amidst great social disorder; the latter, in times of peace, dispenses an exact justice so nearly as human frailties render possible. The former are often compelled to proceed largely upon appearances; the latter seeks to interpose a protecting wall against the errors which appearances often give rise to by requiring consistent and conclusive proof of every essential element of the crime. The former are characterized by the nervous energy of executive, the latter by the calm deliberation of judicial action. Each is best adapted to the time, place and circumstances which environ and call it into being." (Birkheimer, Op. Cit. p. 424.)

[12] Birkheimer, *Military Government and Martial Law* (1892 Ed.), p. 422.

Likewise in contrasting the procedure before the Courts the same authority points out (p. 423):

> "The one (civil court) is established by law, either statutory or common; its procedure is regulated by known rules; its jurisdiction has defined territorial limits; the causes it takes cognizance of are well known. The other, with rare exceptions, is called into being by a military order; its procedure is regulated by the customs which, though well understood in their general bearing, are of variable application; the causes it is to determine are to a great extent known only to the anomalous condition of martial law. * * *"

This authority also quotes with approval the remark of Lord Loughborough in *Grant v. Gould*, 2 H. Blackstone 69, that:

> "* * * it would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction before a justice of the peace."

Birkheimer, believing that the greatest freedom of action is imperative for martial-law tribunals, attempts to dispel any fear of abuse on the part of civilians by stating:

> "If they (civilians) will take counsel of the facts of modern history in free governments, rather than of groundless fears, they will realize that military officers assume the responsibilities or martial law but reluctantly, after the civil authorities have signally failed to meet the ends of government, and it becomes necessary to have some powerful and sufficient substitute to main-

tain order in the distracted district." (Birkheimer, Op. Cit., supra, p. 429.)

Further conceding that (p. 431):

> "The rules of procedure and of evidence of martial-law tribunals may seem crude when judged by the common-law standard,"

he again gives comfort to the civilian:—

> "But it must be remembered that these tribunals are convened only when ordinary methods have ceased to be applicable, and therefore that which in the normal condition of society would be irregular becomes regular and highly commendable. * * * Only the gravest occasions will warrant resort to martial-law tribunals. Generally in the enforcement of martial law, the military will content themselves simply with preserving order and defending their dignity and authority from attack, delivering civilians who may be arrested over to civil officers for trial when the Courts are reinstated.[13] Still * * * there may and do arise occasions when such tribunals justly may be invoked to supply the energy and certainty in the administration of penal affairs which have become necessary, and which cannot be furnished by the ordinary judicial system." (Birkheimer, Op. Cit., p. 431.)

The principle inferable from the writings of jurists is that the use of martial-rule tribunals to mete out

[13]General Short, who was relieved on December 17, 1941, by General Emmons, seems to have recognized this in his original proclamation when he announced: "Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function". (R. 60)

punitive justice to civilians requires that degree of necessity or indispensability which may be considered as overwhelming and counter-balancing the consideration of all the hardships and difficulties that are incident to such use—that in the scale of gradations of possible measures justified by necessity, the displacement of the civil courts by the martial-law tribunals represents the final searching out appropriate only in a critical exigency which demonstrably prevents the Courts from functioning. That the Courts are constitutionally empowered to and will review on proper application the question of whether the circumstances justify this ultimate extension of martial-law power is no longer disputable. (*Ex Parte Milligan*, 4 Wall. 2 (1866); *Sterling v. Constantin*, 287 U. S. 378, 400, 401 (1932); *Hirabayashi v. United States*, 320 U. S. 91 (1943).).

(2) The evidence in the record and findings of the District Court show that the circumstances which would justify the exercise of jurisdiction by a martial law tribunal over a civilian were not present in Hawaii in March, 1943.

Unlike other cases that have come before this Court in the past involving the exercise of war powers or the jurisdiction of military tribunals over civilians, this case is not presented with a record barren of evidence upon which a judicial determination can be made. This Court is not obliged to pass upon the case in the absence of a factual record or to speculate as to the facts or to reach conclusions on the facts unaided by the findings of a trial court.

In the opinion of the trial Court, after summarizing the historic facts relating to the declaration of

martial law and the substantial restoration of civil authority which became effective on March 10, 1943, there is a finding of fact as follows:

> "I find from the evidence that at all times during the year 1943 and continuing to this day, conditions were such throughout all the principal islands of the Territory of Hawaii that the regularly constituted civil government was either in efficient operation or fully capable of such operation in all its branches and ordinary departments and was sufficiently equipped, capable and willing to perform all functions for which it was created." (R. p. 401.)

Therefore the Court concluded as a matter of law that the provost court had no authority in law to try, find guilty and sentence the civilian petitioner to imprisonment in the county jail of the City and County of Honolulu. The validity of the conclusion of law cannot be denied assuming the correctness of the finding of fact, and on appeal, the finding of fact of the trial Court will not be disturbed so long as there is substantial evidence to sustain the fact and the findings are not clearly erroneous.

That it might be more expedient for the Commanding General to try offenders of his orders before his own tribunals furnishes no constitutional basis for the jurisdiction of such tribunals so long as civil courts can, in fact, function. Thus it might also be expedient for workmen who get into altercations with naval guards at the Philadelphia Navy Yard to be tried by provost courts sitting in Philadelphia. It could not be contended that such courts could, upon order of the

Commanding General in the area, sentence Philadelphia Navy Yard workers to six months' imprisonment without a civil court trial.[14]

Assuming that Duncan did assault and "ill treat" the marine sentries as was charged, they could have easily subdued him (as they did) by force or they could have ejected him from the reservation. It is not claimed that Duncan, unarmed and alone, presented any problem to the armed sentries on duty and the rest of the company of marines stationed at the gate. In the first place they could have escorted him outside the reservation either peaceably or by force. The degree of force required to accomplish this would depend upon the resistance encountered. The marines would have been fully justified in using any degree of force even to the extent of killing to compel obedience to their orders. Had they killed him in preserving order or preventing interference with their duties these facts would have constituted a full defense upon their trial in a court martial for homicide.

If Duncan's conduct did not require this degree of force the marines could have reported the incident to

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[14]Cf. *Hirabayashi v. U. S.*, 320 U. S. 81, 93. This Court pointed out that appellant had been tried and convicted in the civil courts and had been subjected to penalties prescribed by Congress for the acts committed in a prescribed military area. Murphy, J.: "We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed for instance that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the laws of war (see *Ex parte Quirin*, 317 U. S. 1) could be deprived of due process of law and the benefits of trial by jury in the absence of a valid declaration of martial law." (p. 110.)

the commandant of the Navy Yard who as an administrative matter could have ordered his discharge from employment and exclusion from the naval reservation. Moreover if the commandant thought the matter serious he could have requested a prosecution either in the federal or territorial courts. Upon conviction he would have been sentenced under the federal statute anything up to ten years depending upon the circumstances of the case.[13] With the Courts of the territory operating every day trying all manner of civil and criminal cases, including the trial of defendants charged with murder on naval reservations and with the total absence of any civil strife or disruptions in any process of government, it is unrealistic to contend that any military necessity dictated the trial of Duncan before a military tribunal.

The contrast between the treatment accorded civilians in England and in Hawaii deserves attention. Under the framework of our Government, the judiciary is vested with the power of finally determining whether the necessity that confronted the Commanding General was so imperious as to justify his trying the petitioner outside the protecting shield of the Constitution. No facts have been adduced bearing on the "state of civilization of the Territory" which shows that the trial judge was in error. There existed in Hawaii no physical forces interfering with the operation of the courts which were not also present to a greater degree in many sections of the country as well as in the P[illegible]n Isles.

[13]Revised L. Hawaii 1935, Ch. 166; U.S.C. Title 18, Sec. 455.

No single instance has come to the attention of counsel in which the military has superseded or attempted to supersede the functions of the civil courts in England.[158] When consideration is given, first, to the comparable dangers which confronted England and Hawaii, second, to the degree of mobilization of manpower required in each place for the prosecution of the war, third, to the fact that in England jury trials and the orderly processes of the Courts continued without interruption, it is difficult to conclude that a case has been made out here for the overturning of constitutional principles.

The principles contended for by the Government would permit the entire country to be placed under a form of modified military government because of time and space factors involved in modern global warfare as distinguished from prior warfare. In England, where many aliens resided, detention of persons connected or suspected of being connected with sabotage or treason has been permitted without civil trial. The necessity for the exercise of this power does not form a basis for martial-law trial of civilians on charges not connected with or related to dangers involving the existence of the state.

[158]Carr, *A Regulated Liberty* (1942), 42 Col. L. Rev. 339.

II.

SECTION 67 OF THE HAWAIIAN ORGANIC ACT DOES NOT DEPRIVE CIVILIANS OF THE TERRITORY OF HAWAII OF THEIR CONSTITUTIONAL RIGHTS NOR AUTHORIZE AN EXTENSION OF THE JURISDICTION OF MILITARY TRIBUNALS NOT JUSTIFIED BY THE LAW OF WAR.

The Government contends that Section 67 of the Hawaiian Organic Act and executive actions taken thereunder enlarge the lawful scope of martial law in the Territory beyond that which would be applicable in a state of the United States. The adoption of this view is urged in part because of the presence of a large population of Japanese ancestry in the Territory, and in part because of the geographic location and strategic importance of the Islands. Before this radical departure from the traditional treatment of Hawaii is adopted, with resulting grave consequences for the Territory and for all of its citizens, careful consideration should be given (1) to the constitutional history of Hawaii prior to annexation; (2) to the judicial determination of Hawaii's right to equal treatment with the states; (3) to an analysis of Section 67 in the light of principles of constitutional law applicable in Hawaii.

(1) The history of Hawaii (including the constitutional provisions later embodied in Section 67 of the Hawaiian Organic Act) discloses that military trials of civilians after a declaration of martial law were limited to cases of persons aiding rebellion or invasion.

Hawaii has had a continuous history of a government of laws under a written constitution for over one hundred years.[16] It has had an efficient legal and

[16] Kuykendall, *Constitutions of the Hawaiian Kingdom* (1940); Papers of the Hawaiian Historical Society No. 21.

judicial system based upon the common law of England equally long. As Senator Cullom said in 1900 when the act to organize a government for Hawaii was being debated in the Senate, "it is an old country and old government".[17]

The first constitution[18] of 1840 was a simple document based upon the Declaration of Rights of 1839. It reflected the religious influence of the early missionaries.

The Constitution of 1852 contained the first mention of the privilege of the writ of habeas corpus, and provided that it should not be suspended unless "when, in cases of rebellion or invasion, the public safety shall require its suspension"[19] and in such cases the King, with the approval of his cabinet and Privy Council, could place the Kingdom under martial law.[20] The right of trial by jury was preserved "inviolate forever".[21] The Constitutions of 1864 and 1887 made no fundamental changes in regard to habeas corpus, martial law and trial by jury.

On January 17, 1893 the Provisional Government was proclaimed which functioned until the adoption of the Constitution of the Republic on July 3, 1894.[22] In this Constitution the words "imminent danger" were imported into Article 31 (the predecessor of Section 67 of the Organic Act) dealing with the suspen-

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[17]33 Congressional Record (1900) 56th Cong. 1st Sess, p. 1919.

[18]The provisions of the prior constitutions are contained in Thurston, *The Fundamental Law of Hawaii* (1904).

[19]Art. 5, Constitution of 1852.

[20]Art. 39 Id.

[21]Art. 6 Id.

[22]See Thurston, *The Fundamental Law of Hawaii* (1904) 194, 201.

sion of the privilege of the writ and martial law.[23] The Constitution of the Republic also changed the guarantee of trial by jury by the importation of a new term to guarantee a trial by "a tribunal having jurisdiction of the case".[24]

In 1895, after the adoption of the Constitution of the Republic, a conspiracy was formed to overthrow the new government. President Dole proclaimed martial law and suspended with the privilege of the writ. The legislative branch of the government immediately enacted legislation for the trial of those engaged in the insurrection to implement the constitutional provision of Article 31. The significant thing is that the 191 persons who were tried during the existence of martial law were, without exception persons engaged in the insurrection. It was never contemplated that those guilty of ordinary crimes were to be dealt with other than by the course of the common law and the statutes of the Republic. In fact the civil courts conducted their ordinary functions which was contemplated by the proclamation of President Dole, which provided that "the Courts will continue in session and conduct ordinary business as usual".[25]

The case of *In re Kalanianaole*[26] held that the privilege of the writ had been suspended, and that the military commission was a proper tribunal to try the petitioner, who had engaged in the conspiracy to overthrow the government.

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[23]Constitution of 1894, Art. 5 and Art. 31.
[24]Id. Art. 6, Section 1.
[25]Appendix.
[26]10 Hawaii 29 (1895).

The language of Article 5 and Article 31 relating to the writ of habeas corpus and martial law read in connection with the changing of the guarantee of trial by jury to the trial before a "tribunal having jurisdiction leads to the inescapable conclusion that the Constitution of the Republic was framed with an eye to a possible counter revolution in which those who engaged in the rebellion would be dealt with before a military tribunal. The fathers of the Constitution of 1894 saw to it that the new Constitution would not leave a jury trial as an avenue of escape for an insurrectionist as had happened in the abortive Wilcox rebellion in 1889.[27]

In the entire constitutional history of Hawaii the provisions relating to the suspension of the privilege of the writ (like the Federal Constitution) always has been understood to be limited to cases involving persons engaged in rebellion or invasion. Since Section 67 of the Hawaiian Organic Act is the direct descendant of Article 31 in the Constitution of the Republic, the scope of Section 67 can hardly be broader in the area of military trials of civilians than it was prior to annexation. Extending the Federal Constitution to Hawaii including the crisp language of the Bill of Rights would seem to afford less room for the view that citizens could thereafter be deprived of the right of trial by jury in cases not involving rebellion or invasion.

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[27] Wilcox plotted to overthrow the government; he was tried in the Circuit Court in Honolulu before a mixed jury who acquitted him, the incident is referred to in the *Kalanianaole Case*, 10 Hawaii 29, 62 (1895).

The annexation of Hawaii was first formally considered by the governments of Hawaii and of the United States in 1853-1854. After a long diplomatic history, in 1897, a treaty between the Republic of Hawaii and the United States was concluded to incorporate Hawaii into the United States. The treaty was never consented to by the United States Senate.

By the Newlands Resolution of July 7, 1898 (30 Stat. 750) Hawaii was annexed as part of the territory of the United States. It provided that the laws of the Hawaiian Islands, "not inconsistent with this joint resolution nor contrary to the Constitution of the United States" should remain in force until the Congress should otherwise determine.

Finally Congress adopted the Hawaiian Organic Act "to provide a government for the Territory of Hawaii". (31 Stat. 141.)

Section 5 of the Hawaiian Act provides:

> "That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States * * *"

The foregoing indicates the intent of Congress that the Constitution of the United States should be in full force and effect in Hawaii from and after the adoption of the Organic Act. That the Constitution of the United States has been extended to Hawaii in all particulars (except in certain political provisions applicable by their terms only to the states) has never been

doubted since the decision in *Hawaii v. Mankichi*, 190 U. S. 197, in which this Court unanimously agreed that after the effective date of the Hawaiian Organic Act "the Islands were undoubtedly made a part of the United States in the fullest sense and given a territorial form of government" (the Court divided on the issue whether the Constitution applied before the passage of the Organic Act); and it has never since been doubted that the guaranties of the Fifth, Sixth and Seventh Amendments extend to incorporated territories which are a part of the United States. (*Hawaii v. Mankichi*, supra, at p. 220; *Rasmussen v. U. S.*, 197 U. S. 516; *Farrington v. Tokushige*, 273 U. S. 284, 299.)

(2) Trial of a civilian by a military tribunal for an offense other than against the law of war is not justified by Section 67 of the Hawaiian Organic Act.

Section 67 of the Hawaiian Organic Act provides:

> "That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and * * * may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

Counsel understands that the Government takes the position that because Congress has authorized the declaration of martial law and the suspension of the privilege of the writ of habeas corpus in cases of im-

minent danger of invasion, Congress thereby, as a part of the martial law, authorized the creation of the martial-law tribunal that tried the petitioner in the case at bar. The language of the statute does not disclose any such congressional intention. Martial law is not defined in the Hawaiian Organic Act nor is there any other indication in the Act that the common law scope thereof was intended to be enlarged beyond that normally applicable in the states of the Union—that is, to include measures other than those dictated by necessity.

The inclusion of the words "or imminent danger thereof, when the public safety requires it" in the Hawaiian Organic Act indicates the desire on the part of Congress to intrust to the executive arm in the Territory the right to suspend the privilege of the writ when invasion or insurrection was threatened. Nothing in the Act indicates that Congress contemplated that a new form of military government could be instituted on domestic soil when and if the United States became involved in a war in which the island bases would be of great strategic importance.[28]

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[28]Cf. Statement of Haney, J., in *Ex parte Zimmerman*, 132 F. (2d) 442 at 452 (C.C.A. 9th): "It could be, but is not, argued that when Congress incorporated the Territory of Hawaii, it did so subject to the limitations expressed in the Organic Act, 48 U.S.C.A. Sec. 532, that the governor of such territory might 'suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law' and that such limitations expressly authorized a military government pursuant to the quoted (Art. IV, Sec. 3, cl. 2) Constitutional power. However, since no argument is made upon that precise point, and since it is assumed that a citizen's rights in the Territory of Hawaii are the same as those of a citizen in the United States I have considered the case on that basis." From what is shown herein it is submitted that any such argument as is envisioned by the judge would be wholly without constitutional foundation.

It is not necessary for this Court to determine the extent to which, in the event of threatened invasion or insurrection, a military court would be justified in exercising power with respect to persons committing offenses related to such threatened invasion or insurrection. The case at bar presents no such problem. The language of the majority in the *Milligan* case must be reviewed in the light of the circumstances that confronted the Court. When the Court said that "Martial law cannot arise from a threatened invasion. The necessity must be actual and present * * *" the Court was using general descriptive language to express its conclusion that the necessity giving rise to the trial of civilians by a military tribunal for offenses other than against the laws of war must be an overwhelming necessity. The words "threatened" and "imminent" lend themselves to division in various degrees. The phrase "when the public safety requires it", coupled with the words "imminent danger thereof", in Section 67 of the Hawaiian Organic Act, presuppose that the particular exercise of power will, in fact, be related to the public safety, hence under the language of the Hawaiian Organic Act, before the petitioner could be tried before a military tribunal, it is necessary for this Court to determine (1) that the public safety requires such trial; (2) that such trial is related to imminent invasion or insurrection.

Viewed in the foregoing light, Section 67 of the Hawaiian Organic Act, with the inclusion of the words "or imminent danger thereof", is not inconsistent with the provision in Article I, Section 9 of the Con-

stitution of the United States to the effect that the privilege of the writ shall not be suspended unless when in cases of rebellion or invasion the public safety may require it. On the other hand if Section 67 should be interpreted as permitting the suspension of the writ even in cases when not required by the public safety because of actual invasion or insurrection or the imminence thereof then the authority created by Section 67 goes beyond the scope of the authority permitted by the Constitution.

Even if it should be held that Section 67 does enlarge the occasions or periods when martial law may be declared or the privilege of the writ suspended, such a holding would not support the jurisdiction claimed by the Government for the military tribunal in the case at bar. It is virtually axiomatic that the suspension of the privilege of the writ does not authorize the executive arm of the Government to prescribe new crimes or offenses or to create "courts" or "tribunals" to try offenses. If the petitioner were within the class of persons as to whom the privilege of the writ had been and could be constitutionally suspended the result would merely be that during the suspension on a proper showing the petitioner could be held in military custody because his detention was dictated by military necessity.[29]

> "Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce

[29]Cf. *Ex parte Zimmerman*, 132 F. (2d) 442 (C.C.A. 9th).

> the person arrested in answer to a writ of habeas corpus. *The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law.* If it had intended this result, it was easy by the use of direct words to have accomplished it." (*Ex parte Milligan*, 4 Wall. 1, 18.)

Similarly, assuming that the Hawaiian Organic Act does enlarge the time within which martial law may be declared or the privilege of the writ suspended, nevertheless the Hawaiian Organic Act, like the Constitution does "not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law." "If it had intended this result, it was easy by the use of direct words to have accomplished it."

The Government disavows any intention of contending that Congress intended that the privilege of the writ of habeas corpus might be suspended in the Territory beyond the scope of the constitutional provision. Nevertheless the Government, in the Court below, referred to King, *Legality of Martial Law in Hawaii* (1942), 30 Calif. L. Rev. 599, as "impressive authority" in support of the contention that Congress so intended. The article referred to fails to consider the status of Hawaii as incorporated territory and attributes meaning to *In re Kalanianaole*, 10 Haw. 29, which is not justified by the constitutional and statutory framework on which the Supreme Court of the Republic of Hawaii decided that case.

It is true that Article 31 of the Constitution of the Republic of Hawaii was similar in language to Section 67 of the Hawaiian Organic Act. It is also true that in *In re Kalanianaole*, supra, the Supreme Court of the Republic of Hawaii held that the trial by a military commission of a person charged with misprision of treason for having participated in a rebellion, does not deprive such person of his constitutional rights under the Constitution of the Republic of Hawaii. However, the holding is of no significance in the interpretation of Section 67, for several reasons: Prior to the military trial express legislation had been enacted to provide for the carrying out of sentences of the military Commission. Subsequent legislation ratified and approved the establishment of the military Commission. At the time of trial, the Constitution of the Republic of Hawaii did not guarantee trial by jury but provided merely for trial by a tribunal having jurisdiction of the case; the constitutional guaranties of the Fifth, Sixth and Seventh Amendments to the Constitution of the United States were not applicable in the Republic of Hawaii, although as above shown it has clearly been established that such guaranties are now applicable in the Territory of Hawaii.[36] By Section 5 of the Hawaiian Organic Act Congress has clearly indicated its intent that the limitations of the Constitution of the United States are to be of full force and effect in the Territory of Hawaii.

[36]Article 6, Section 1, of the Constitution of The Republic of Hawaii provided: "No person shall be subject to punishment for any offense except on due and legal conviction thereof by a tribunal having jurisdiction of the case."

III.

THE CIRCUIT COURT OF APPEALS ERRED IN RULING THAT A "TOTAL MILITARY GOVERNMENT" LAWFULLY EXISTED IN HAWAII.

Although it was not urged below the Circuit Court of Appeals approved of the erection of a "total military government" over Hawaii. The Court below held that "martial law" was synonymous with "military government". This one vital error corrupts the whole judgment of the Circuit Court of Appeals. The language of Section 67 of the Hawaiian Organic Act affords no basis for this conclusion and it is directly contrary to the opinion of Chief Justice Chase in *Ex parte Milligan*. The distinction between martial law and military government has been generally regarded as settled for more than seventy-five years of judicial decision, text writers and official War Department texts.[31]

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[31] *Ex parte Milligan*, 4 Wall. 2, 132;
A Manual for Courts-Martial, U. S. Army (1928) p. 1;
Rules of Land Warfare, F.M. 27-10, 281, 283;
Birkheimer, *Military Government and Martial Law* (1892) (3rd Ed.) 1;
Lieber, *The Justification of Martial Law* (1898) 3;
2 Winthrop's *Military Law and Precedents* (1896) (2d Ed.) 1245;
Wiener, *A Practical Manual of Martial Law* (1940) 7;
8 *Ops. A. G.* 365;
3 Willoughby, *The Constitutional Law of the United States* (1929) (2d Ed.) 1592;
Cramer, 29 *A.B.A.J.* (1943) 368.

IV.

THE WRIT OF HABEAS CORPUS WAS AVAILABLE TO THE PETITIONER IN THIS CASE.

The Government concedes that if petitioner's military trial is invalid he is entitled to his release because of the formal termination of martial law on October 24, 1944, by proclamation. (Memorandum for United States, p. 17.) Our position is that regardless of the formal demise of martial law and the concession by the Government, petitioner would nevertheless be entitled to his release on habeas corpus. The argument in support of this view will be briefly summarized:

The case below was heard by the Court of Appeals *en banc*.[32] The opinion of the Court by Judge Healy concurred in by Judge Garrecht assumed that the writ of habeas corpus was available to petitioner and concluded that the military trial was valid. Judge Wilbur, with whom Judge Mathews concurred, concluded that the validity of the military trial was "a matter of great doubt" and accordingly stated as an additional ground for the reversal of the trial court, the view that the privilege of the writ was suspended as to this case. Judge Denman was of the view that the petition as a matter of pleading was insufficient.

It is submitted that the opinion of the Court assuming the writ available to petitioner is correct and that the concurring opinion of Judges Wilbur and Mathews holding the writ not available to petitioner

[32]Except for Circuit Judge Healy who was not present at argument but who by stipulation of counsel was a member of the Court to whom the case was submitted.

is in error. The latter view confuses the power to arrest and detain persons suspected of being hostile to the government with the power to try and punish loyal citizens for violations of ordinary municipal law. Neither Article I, Section 9 of the Federal Constitution nor Section 67 of the Hawaiian Organic Act contemplate any general suspension of the privilege of the writ of habeas corpus in all cases. The purpose of Article I, Section 9 of the Federal Constitution and the purpose of Section 67 of the Hawaiian Organic Act was to permit the detention of persons who might be hostile to the government. These provisions were never intended to prevent a judicial review or the release of a citizen tried before a military tribunal for an offense of the class constitutionally triable only by jury.[33]

CONCLUSION.

This cause involves the fundamental question whether in time of war after a declaration of martial law with the Courts open and in the complete exercise of their statuory powers the right of trial by jury is

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[33]On the limited nature of the suspension of the privilege of the writ see: Hurd, *A Treatise on the Right of Personal Liberty and the Writ of Habeas Corpus* (2d Ed. 1876) 116 et seq.; II Farrand, *Records of the Federal Constitutional Convention* (1911) 438; III Farrand, Op. Cit. 149; Binney, *The Privilege of the Writ of Habeas Corpus Under the Constitution* (2d Ed. 1862) Third Part 37; Civil War suspensions of the privilege were confined to persons charged with "treasonable practices" President Lincoln's letter to Erastus Corning, July 12, 1862, Stern, *Life and Writings of Abraham Lincoln* (Mod. Lib. Ed.) 760, 6 Richardson, *Message and Papers of the Presidents* (1897) 17, 19, 25; and the limited nature of the suspension was judicially determined in *People v. Gaul*, 44 Barb. (1865) 98.

to be scrapped and military trials substituted in that class of cases which traditionally and constitutionally are triable only by jury. The decree below in effect holds that the will of the commander, not the Constitution and laws of the United States, is the supreme law of the land. It is not only without precedent in our judicial history but embodies a principle contrary to the very genius of our form of government.

The advent of the atomic age make it all the more important that this Court steadfastly adhere to its traditional role as the guardian of our civil liberties under a reign of law. While it is true that the Courts alone cannot preserve our liberties it is nevertheless the duty of the Courts "in time of war as well as in time of peace to preserve unimpaired the constitutional safeguards of civil liberty".[34] This Court should lay down no rule in these cases that will serve as an excuse in any future emergency for the seizure of civil government by the military authorities. The decree below should be reversed and the judgment of the District Court should be affirmed.

Dated, Honolulu, Hawaii,
October 19, 1945.

Respectfully submitted,
J. GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

[34] *Ex parte Quirin* (1942), 317 U. S. 1, 19.

(Appendix Follows.)

Appendix

CONSTITUTION OF THE UNITED STATES.

Art. I, Sec. 9, Cl. 2:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."

Art. IV, Sec. 3, Cl. 2:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

AMENDMENTS.

Article V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;"

Article VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

HAWAIIAN ORGANIC ACT.

Constitution and laws of United States in effect. The Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. (Apr. 30, 1900, ch. 339, Sec. 5(a), 31 Stat. 141; 48 U.S.C. 495.)

* * * * * * *

Governor to execute laws. The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress

lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known. (Apr. 30, 1900, ch. 339, Sec. 67, 31 Stat. 153, 48 U.S.C. 532.)

PROCLAMATION OF EXISTENCE OF DEFENSE PERIOD.

Under and by virtue of the powers vested in me by Act 24 of the Special Session Laws of Hawaii, 1941, and particularly section 5 thereof, and under and by virtue of all other powers in me vested by law, I, J. B. POINDEXTER, Governor of the Territory of Hawaii, do hereby find that a state of affairs exists arising out of an attack upon the Territory of Hawaii and that all of the circumstances make it advisable to protect the Territory and its inhabitants as provided in and by said Act 24 of the Special Session Laws of Hawaii 1941, and all other laws relating thereto; and by reason of the foregoing,

I do declare and proclaim a defense period to exist throughout the Territory of Hawaii.

This proclamation shall take effect upon promulgation thereof by official announcement by me by means of radio broadcast which I do further declare

to have taken place at 11:30 o'clock A. M. on the date hereof.

DONE at Honolulu, Territory of Hawaii this 7th day of December, 1941.

JOSEPH B. POINDEXTER,
Governor of the Territory of Hawaii.

GENERAL ORDERS NO. 4.

7 December 1941

By virtue of the power vested in me as Military Governor, the following policy governing the trial of civilians by Military Commissions and Provost Courts is announced for the information and guidance of all concerned:

1. Military commissions and provost courts shall have power to try and determine any case involving an offense committed against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authority. The jurisdiction thus given does not include the right to try commissioned or enlisted personnel of the United States Army and Navy. Such persons shall be turned over to their respective services for disposition.

2. Military commissions and provost courts will adjudge sentences commensurate with the offense committed. Ordinarily, the sentence will not exceed the limit of punishment prescribed for similar offenses

by the laws of the United States or the Territory of Hawaii. However, the courts are not bound by the limits of punishment prescribed in said laws and in aggravated cases and in cases of repeated offenses the courts may adjudge an appropriate sentence.

3. The record of trial in cases before military commissions will be substantially similar to that required in a special court martial. The record of trial in cases before provost courts will be substantially similar to that in the case of a Summary Court Martial.

4. The procedure in trials before military commissions and provost courts will follow, so far as it is applicable, the procedure required for Special and Summary Courts Martial respectively.

5. The records of trial in all cases will be forwarded to the Department Judge Advocate. The sentences adjudged by provost courts shall become effective immediately. The sentence adjudged by a military commission shall not become effective until it shall have been approved by the Military Governor.

6. All charges against civilian prisoners shall be preferred by the Department Provost Marshal or one of his assistants.

7. The Provost Marshal is responsible for the prompt trial of all civilian prisoners and for carrying out the sentence adjudged by the court.

8. Charges involving all major offenses shall be referred to a military commission for trial. Other

cases of lesser degree shall be referred to provost courts. The maximum punishment which a provost court may adjudge is confinement for a period of 5 years, and a fine of not to exceed $5000.00. MILITARY COMMISSIONS MAY ADJUDGE PUNISHMENT COMMENSURATE WITH THE OFFENSE COMMITTED AND MAY ADJUDGE THE DEATH PENALTY IN APPROPRIATE CASES.

9. In adjudging sentences, provost courts and military commissions will be guided by, but not limited to the penalties authorized by the courts martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases.

THOMAS H. GREEN,
Lt. Col. J.A.G.D.
Executive Officer.

HAWAII CONSTITUTION OF 1852.

ARTICLE 5. The privilege of the writ of Habeas Corpus belongs to all men, and shall not be suspended, unless by the King, when, in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. The rights of trial by jury, in all cases in which it has been heretofore used in this Kingdom, shall remain inviolate forever.

ARTICLE 39. The King, by and with the approval of His Cabinet and Privy Council, in case of invasion or rebellion, can place the whole Kingdom, or any part of it under martial law; and he can ever alienate

it, if indispensable to free it from the insult and oppression of any foreign power.

HAWAII CONSTITUTION OF 1864.

ARTICLE 5. The privilege of the writ of *Habeas Corpus* belongs to all men, and shall not be suspended, unless by the King, when in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case.

ARTICLE 37. The King, in case of invasion or rebellion, can place the whole Kingdom or any part of it under martial law.

HAWAII CONSTITUTION OF 1887.

ARTICLE 5. The privilege of the writ of *Habeas Corpus* belongs to all men, and shall not be suspended, unless by the King, when in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case.

ARTICLE 37. The King, in case of invasion or rebellion, can place the whole Kingdom, or any part of it, under martial law.

Article 5.—Writ of Habeas Corpus

The privilege of the Writ of Habeas Corpus belongs to all men, and shall not be suspended, except by the President or by one of the Cabinet Ministers as herein provided, when in case of rebellion or invasion, or imminent danger of rebellion or invasion, the public safety shall require its suspension.

Provided, however, that no alien unlawfully entering the Republic shall be entitled to this Writ as of right.

Article 6.—Right of Trial

Section 1. No person shall be subject to punishment for any offense except on due and legal conviction thereof by a tribunal having jurisdiction of the case.

Article 31.—Martial Law

Suspension of Habeas Corpus

The President, or one of the Cabinet Ministers as herein provided, may, in case of rebellion, or invasion, or imminent danger of rebellion or invasion, when the public safety requires it, suspend the privilege of the writ of habeas corpus or place the whole or any part of the Republic under martial law.

Article 100.—Advisory Council

Until the convening of the first Legislature, in either special or regular session, the members of the

Advisory Council of the Provisional Government of the Hawaiian Islands shall constitute a council to be styled the "Advisory Council of the Republic of Hawaii".

The Advisory Council of the Republic of Hawaii and the Executive Council, sitting together, shall be vested with all the powers and authority heretofore vested in the Executive and Advisory Council of the said Provisional Government, and also all the powers and authority by this Constitution granted to the Senate or to the Legislature.

Such convening of the Legislature shall thereby terminate the existence, power and authority of the Advisory Council.

PROCLAMATION.

EXECUTIVE BUILDING.

Honolulu, H. I., Jan. 7, 1895.

The right of *Writ of Habeas Corpus* is hereby suspended and *Martial Law* is instituted and established throughout the Island of Oahu to continue until further notice, during which time, however, the Courts will continue in session and conduct ordinary business as usual, except as aforesaid.

By the President:

SANFORD B. DOLE,
President of the Republic of Hawaii.

J. A. King,
Minister of the Interior.

ACT 18.

An Act Providing for the Carrying out by the Marshal or his Deputy of Sentences of Military Commissions and Courts Martial.

Be it enacted by the Executive and Advisory Councils of the Republic of Hawaii:

Section 1. It shall be the duty of the Marshal or his Deputy, whenever so required by the order of the Commander in Chief of the Military Forces, or by the precept or Mandate of the President, and upon and in conformity therewith, to execute and carry out the sentence of any Military Commission or Court Martial convened, or to be convened, in the manner and at the time and place designated in the order approving the findings and proceeding of and confirming or modifying the sentence imposed by such Military Commission or Court Martial.

Any jail or prison of the Republic or other place designated by the President or Commander in Chief may be used as a place of imprisonment or detention of any person convicted and sentenced to imprisonment by any such Commission or Court Martial.

Section 2. This Act shall take effect from the date of its approval.

Approved this 8th day of February, A. D. 1895.

(Signed) SANFORD B. DOLE,
President of the Republic of Hawaii.

(Signed) J. A. KING,
Minister of the Interior.

ACT 20.

An Act Relating to Martial Law, Trials by Military Commission and the Liability of Officers of the Government and Others for Acts Done in Suppressing Rebellion.

Whereas, Being seduced by the insidious counsel of wickedly designing persons, many individuals resident in the Island of Oahu did conspire by force to overthrow the Constitution and Government here established by law, and in furtherance of such, their purpose did with force and in confederated multitude on the 6th day of January, 1895, and on divers other days then following, in the District of Honolulu, Island of Oahu, levy war against this Republic, and did commit murder and other felonies, and did provide themselves with arms, ammunition and dynamite with treasonous purpose, and with intent to terrorize the inhabitants of the city of Honolulu, and for a time to overturn and destroy all government; and * * *

Be it enacted by the Executive and Advisory Councils of the Republic of Hawaii:

Section 1. All proclamations and orders published or made and all acts, matters and things commanded, directed or done, or to be commanded, directed or done by the President, or by any officer of the Government, or other person acting under the authority of the President, for the purposes and during the time herein declared, that is to say, on, from and since January 6, 1895, until martial law shall be declared

to be no longer in force, whether done in a district in which martial law was proclaimed or was in force, or done in a district in which martial law was not in force, in the proclamation or furtherance of martial law, or in the suppression of insurrection, or in the establishment of a military tribunal, or in the arrest, imprisonment, deportation, trial, conviction or sentence of any person charged with treason, misprision of treason, conspiracy to incite or commit treason, or with any disloyal or seditious practice or with any act or conspiracy dangerous to the peace or to the safety of life or property or in the arrest and detention of persons held for investigation, are hereby declared to have been done within the constitutional authority of the President and are confirmed.

Section 2. This Act shall take effect from and after the date of its publication.

Approved this 15th day of March, A. D. 1895.
(Signed) SANFORD B. DOLE,
President of the Republic of Hawaii.

(Signed) FRANCIS M. HATCH,
Minister of Foreign Affairs.

ACT 24.

An Act to Prevent the Bringing of Actions Against Officers of the Government or Others for Acts done in Suppressing Rebellion.

Be it enacted by the Executive and Advisory Councils of the Republic of Hawaii:

Section 1. No prosecution, indictment, action or suit shall be maintained in any court, criminal or civil, against any officer of the Government or other person acting *bona fide* under the authority of the President or in good faith for the purpose of suppressing rebellion, for any acts, matters and things done or omitted to be done, or which shall be done, on, from and since January 6, 1895, until martial law shall be declared to be no longer in force, whether done in a district in which martial law was proclaimed or in force, or done in a district in which martial law was not in force, in the suppression of rebellion or in furtherance of the object of martial law, or in the arrest, imprisonment, deportation, trial, conviction or sentence of any person charged with treason, misprision of treason, conspiracy to incite or commit treason or with any disloyal or seditious practice or act or with any act or conspiracy dangerous to the peace or the safety of life or property, or in the arrest and detention of persons held for investigation.

Section 2. In order to prevent any doubt which might arise whether any act alleged to have been done, as aforesaid under the order or authority of the President or to have been done *bona fide* in order to suppress insurrection was so done, it shall be lawful for the President or his successor to declare such acts to have been done under such order or authority or *bona fide* for the purpose aforesaid; and such declaration by any writing under the hand of the President or his successor shall in all cases be conclusive

evidence that such acts were so done respectively; and such order or declaration may be shown under the general issue or pleaded in bar; and if so pleaded such plea shall suffice, although it may set out merely the general effect of such order or declaration or the fact only that such order or approval was given prior to the matter complained of or has been since received.

Section 3. This Act shall take effect from and after the date of its publication.

Approved this 15th day of March, A.D. 1895.

(Signed) SANFORD B. DOLE,
President of the Republic of Hawaii.

(Signed) FRANCIS M. HATCH,
Minister of Foreign Affairs.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 14

LLOYD C. DUNCAN,

Petitioner,

vs.

DUKE PAOA KAHANAMOKU, SHERIFF OF THE CITY AND COUNTY OF HONOLULU,

Respondent

MEMORANDUM ON BEHALF OF PETITIONER

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MEMORANDUM ON BEHALF OF PETITIONER

This memorandum, submitted for the convenience of the court, consists of two parts, first a chronology and second a partial digest of General Orders Nos. 1 to 181 covering the period December 7, 1941 to January 30, 1943, which is Exhibit "V" in evidence but which is not in the printed record. The record references in this memorandum are to the printed record in *Ex parte Duncan*, No. 14, unless otherwise indicated. Record references to *Ex parte White*, No. 15, are indicated thus: (White R. —).

I

Chronology

December 7, 1941: (a) Hawaii Defense Act (Act 24, Special Session, S. L. Hawaii 1941) invoked.

(b) Privilege of writ of habeas corpus suspended and martial law proclaimed (R. 12).

(c) Lt. Gen. Walter C. Short proclaims himself "Military Governor of Hawaii" (R. 58).

(d) Governor Poindexter wires the President "I have today declared martial law throughout the Territory of Hawaii and have suspended the privilege of the writ of habeas corpus. Your attention is called to section 67 of the Hawaiian Organic Act for your decision on my action. Poindexter."

(e) Provost courts and military commissions established for the trial of civilians for offenses "against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authorities" (White R. 79).

December 8, 1941: Territorial courts closed by order of Lt. Gen. Walter C. Short (White R. 81).

December 9, 1941: The President wired Governor Poindexter: "Your telegram of December 7th received and your action in suspending the writ of habeas corpus and placing the Territory of Hawaii under martial law in accordance with U. S. C. title 48 section 532 has my approval. Franklin D. Roosevelt" (R. 61).

December 16, 1941: G. O. 29 authorized the opening of the courts except for jury trials, subpoenaing of witnesses, or the issuance of a writ of habeas corpus (White R. 82-85).

December 17, 1941: General Short replaced by General Delos C. Emmons who proclaimed himself "the Military Governor of Hawaii" (R. 63).

December 22, 1941: Roberts Commission arrives in Hawaii (Senate Document 159, 77th Cong., 2d sess.).

January 27, 1942: G. O. No. 57 authorized the courts "as agents of the Military Governor" to exercise their normal functions except for jury trials, writs of habeas corpus, and other specified cases (White R. 86-88).

February 19, 1942: Petition for writ of habeas corpus filed in *Ex parte Zimmerman*, 132 Fed. (2d) 442; petitioner released, case rendered moot, 319 U. S. 744.

March 21, 1942: The act of Congress creating military areas and authorizing regulations by military commanders approved (56 Stat. 173).

June 2-6, 1942: Japanese defeated at Midway and threat of invasion of Hawaii lifted (R. 670); see also Biennial report of the Chief of Staff of the United States Army (1943) 14, House Document No. 288, 78th Cong., 1st sess.

July 23, 1942: President appoints Federal Judge Ingram M. Stainback Governor of Hawaii (R. 821).

August 25, 1942: Harry E. White tried for embezzlement in provost court (White R. 15-16).

October 16, 1942: Hawaii designated as a military area pursuant to Executive Order No. 9066 and 56 Stat. 173.

December —, 1942: Governor Stainback negotiates with War; Justice and Interior Departments for termination of martial law (R. 880-4).

January 1, 1943: General Emmons declares "Hawaii safe * * * against any invasion the Japanese currently may be able to organize" (R. 1142).

February 8, 1943: Governor Stainback issues proclamation restoring civil authority in Hawaii (R. 14); General Emmons issues similar proclamation (R. 17).

February 17, 1943: Territory Legislature in session (S. L. Hawaii 1943).

March 10, 1943: Civil authority restored in Hawaii; General Emmons revokes Military Orders 1 to 181 inclusive and issues new orders as "Military Governor" (R. 94-363).

June 1, 1943: General Emmons relinquishes position "as Military Governor" (R. 66) and Lt. Gen. Robert C. Richardson, Jr., assumes "all the powers and duties held, possessed, assumed, imposed upon and exercised" by General Emmons (R. 69).

July 30, 1943: Petitions for writs of habeas corpus filed in *Ex Parte Seifert*, U. S. D. C. (Haw.) No. 296; *Ex Parte Glockner*, U. S. D. C. (Haw.) No. 295, petitioners released and case rendered moot (Govt. brief, *Ex parte Duncan*, p. 17).

August 25, 1943: General Richardson issues G. O. No. 31 threatening United States District Judges, clerks, marshal, lawyers, and others with fine or imprisonment for filing petitions for writs of habeas corpus (R. 1097-1105).

November 23, 1943: Gilbert Islands captured by our forces (R. 628).

January 31, 1944: Admiral Chester W. Nimitz proclaims himself Military Governor of the Marshall Islands (R. 748).

March 2, 1944: Lloyd C. Duncan tried for assault in provost court at Pearl Harbor (R. 11).

March 14, 1944: Petition for writ of habeas corpus filed on behalf of Lloyd C. Duncan (R. 4).

April 13, 1944: Opinion of United States District Judge Delbert E. Metzger (R. 384).

April 14, 1944: Petition for writ of habeas corpus filed on behalf of Harry E. White (White R. 4-5).

April 20, 1944: Judgment granting writ of habeas corpus in *Duncan* case (R. 403).

May 2, 1944: Decision of United States District Court Judge J. Frank McLaughlin in *Ex Parte White* (White R. 57-73) and judgment entered (White R. 92).

May 18, 1944: Petition for writ of habeas corpus, *Ex Parte Fred Spurlock* (Petition for certiorari, No. 841, October Term 1944); rendered moot by the release of petitioner.

October 24, 1944: Proclamation of President Roosevelt, No. 2627, terminating martial law (9 Fed. Reg. 12831).

Proclamation of the Governor of Hawaii terminating martial law (Government brief 85).

November 1, 1944: Decision of the Circuit Court of Appeals for the Ninth Circuit in *Ex Parte Duncan* and *Ex Parte White* (R. 1187-1231).

II

The following is a partial digest of General Orders Nos. 1 to 181, covering the period December 7, 1941 to January 30, 1943, all of which were enforced in the provost courts and governed the conduct of the civil population of Hawaii:

G. O. No.	*Date*	*Subject*
2	December 7, 1941	Saloons closed.
4	December 7, 1941	Created military tribunals for the trial of civilians.
6	December 8, 1941	Schools closed.
7	December 8, 1941	Established the "Office of the Military Governor."
14	December 10, 1941	Censorship of press and radio.
16	December 11, 1941	Blackout and curfew.
24	December 14, 1941	Regulated retail stores, physicians, dentists and veterinarians in connection with the purchase and sale of medical supplies.
27	December 15, 1941	Rationing of gasoline.
29	December 16, 1941	Authorized the courts to perform certain functions "exercised by them during the existence of civil government." (White R. 82-85)
38	December 20, 1941	Freezing labor and wages.
42	December 24, 1941	Opened places of amusement.
43	December 24, 1941	No parking on certain streets.
44	December 26, 1941	Regulation of cold storage, cloth in bolts, the Hawaii Territorial Guard, narcotics, and intoxicating liquor.
49	January 6, 1942	Blackout, traffic control, parking, rent control, newspapers.
50	January 9, 1942	Authorized opening of certain schools; extended hours of amusement places to include Sundays; regulated pinball machines.
51	January 9, 1942	Prohibited the possession by any person of currency in excess of $200.00.
52	January 14, 1942	Authorized labor on Sundays; regulated solicitors.
53	January 15, 1942	Sale of food; control of fuel oil.

G. O. No.	Date	Subject
54	January 20, 1942	Issuance of gas masks; traffic, appointment of trial judge advocate; regulated the conduct of dogs; regulated the hours of business and places of amusement.
55	January 21, 1942	Ordered the United States Marshal to turn over a vessel in his custody; ordered an inventory of food; and regulated the sale and distribution of tires and automobile parts.
56	January 26, 1942	Registration of all males over 18 ordered to report to U. S. Employment Service; regulated the sale of seed; stated the organization of the "Office of the Military Governor."
57	January 27, 1942	Regulated imports into Hawaii; permitted the opening of Territorial courts as "agents of the Military Governor," but prohibited trial by jury, sessions of the grand jury, or the issuance of any writ of habeas corpus (White R. 86-88).
58	January 28, 1942	Regulated poultry and cattle feed.
59	January 29, 1942	Regulated the printing and circulation of newspapers and magazines.
65	February 3, 1942	Extended the curfew till 8 p. m. for pedestrians other than enemy aliens; blackout regulations remained in effect.
66	February 3, 1942	Decreed daylight saving time, blackout hours; extended curfew till 9 p. m. for pedestrians; regulated the hours of opening and closing of business and places of amusement.
68	February 4, 1942	Authorized the sale of liquor in bars and purchase by individuals under permit system.
71	February 7, 1942	Curfew for children; changed city ordinances in regard to one-way streets and left turns.
72	February 10, 1942	Regulated the payment of rent for housing accommodations.
73	February 11, 1942	Designated February 11 to 18, "emergency cleanup week" for Honolulu; plan for evacuation of civilians in emergency; changed one-way streets.
74	February 16, 1942	Regulated radios.
75	February 19, 1942	Established price control of food and seeds.
79	February 27, 1942	Permits for shipment of food.
80	February 27, 1942	Epidemic disease and vaccination program.
81	February 28, 1942	Required livestock and poultry census.

G.O. No.	Date	Dubject
82	March 4, 1942	Ordered U. S. Marshal to surrender vessel in his custody.
83	March 10, 1942	Prohibited actions for recovery of real estate.
88	March 19, 1942	Regulated slaughter of hogs.
89	March 25, 1942	Regulated blackout, traffic, bus stops, poisons, and "carriage of information to mainland."
91	March 31, 1942	Regulated labor, wages, hours, employment.
94	April 4, 1942	Regulated sale of intoxicating liquors.
96	April 10, 1942	Regulated use of denatured tallow in making soap.
101	April 30, 1942	Regulating interisland travel, speed limits, loading zones, blackout, curfew, children, civilian hospitals.
104	May 15, 1942	Prohibited wearing of khaki clothes by civilians.
108	May 29, 1942	Price control.
113	June 5, 1942	Removal of keys from parked cars; child labor.
117	June 20, 1942	Blackout hours; hours for restaurants, bowling alleys and moving picture theatres.
118	June 25, 1942	Regulations relating to issuance and use of United States currency.
120	June 26, 1942	Suspended holidays and premium pay.
121	June 30, 1942	Regulated collapsible tin tubes; movement of contractors' equipment; and pork.
122	July 1, 1942	Provost courts; and collection and disposal of swill; dry garbage and rubbish in Honolulu.
129	July 28, 1942	Lighting; white fenders; nationals of Hungary and Rumania.
130	August 3, 1942	Taxicabs.
132	August 17, 1942	Motor vehicle traffic during blackout.
133	August 31, 1942	Jurisdiction of civil courts (Govt. brief *Ex parte Duncan*, pp. 86–90).
134	September 1, 1942	Blackout, pedestrian traffic, vehicular traffic, interisland travel, central identification bureau, intoxicating liquors, and gambling devices.
135	September 4, 1942	Jurisdiction of civil courts (Govt. brief *Ex parte Duncan*, pp. 91–95).
136	September 9, 1942	Regulated numbering of houses in Honolulu.
137	September 11, 1942	Rubbish and cleanup program; blackout hours.
144	September 29, 1942	Staggered hour plan for business and schools.
149	October 29, 1942	Restrictions on use of zinc oxide and sale of industrial alcohol.

G. O. No.	Date	Subject
152	November 5, 1942	Registration of females over sixteen and requirement for registration with the USES.
154	November 7, 1942	Chlorination of water in Hawaii.
166	December 22, 1942	Registration of laboratories.
167	December 30, 1942	Regulation of bowling alleys and moving picture theatres.
170	January 5, 1943	Parking regulations.
174	January 18, 1943	Penalties for false statements to military authorities.
175	January 21, 1943	Lifting restrictions on lighted cigars, cigarettes and pipes during blackout.
177	January 28, 1943	Requiring solicitors circulating among the public to register.
181	January 30, 1943	Regulating the shipment of food.

On February 8, 1943, proclamations were issued by the Governor of Hawaii and the "Military Governor" which became effective on March 10, 1943, at which time all existing General Orders 1 to 181, inclusive, were revoked, and a new set of General Orders was issued, which are found in the Record, pp. 94-362. None of the orders was submitted to the Governor prior to issuance or approved by him (R. 829).

Dated at Washington, D. C., December 14, 1945.

Respectfully submitted,

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ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

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JAN 31 1945

No. 791

In the Supreme Court of the United States

OCTOBER TERM, 1944

LLOYD C. DUNCAN, PETITIONER

v.

DUKE PAOA KAHANAMOKU, SHERIFF, CITY AND COUNTY OF HONOLULU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 389) is not reported. The opinions rendered in the Circuit Court of Appeals (R. 1188) are not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 1, 1944 (R. 1232). The petition for a writ of certiorari was filed on December 29, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the imprisonment of the petitioner, a civilian, pursuant to a conviction in a military provost court for assault upon two marine sentries on a military reservation with intent to hinder them in the performance of their duties, in violation of a military order making such an assault an offense triable in the provost court, is valid under martial law proclaimed by the Governor of Hawaii and approved by the President under the Hawaiian Organic Act (48 U. S. C. 532).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are printed in the Appendix (*infra*, pp. 25–26).

STATEMENT

The petitioner was convicted on March 2, 1944, in the Provost Court for the Island of Oahu, Territory of Hawaii, for the offense of assaulting two United States Marine Corps sentries at the main gate of the Navy Yard in Pearl Harbor, T. H., with intent to hinder them in the lawful discharge of their duties, in violation of paragraph 8.01 of General Orders No 2 of the Military Governor of Hawaii, dated March 10, 1943 (R. 98–118).

Before stating the facts of the petitioner's case it may be helpful to set forth the authority under which the provost courts were established.

Establishment of martial law in Hawaii.—On December 7, 1941, after the Japanese attack on Pearl Harbor, the Governor of Hawaii issued a public proclamation stating that pursuant to Section 67 of the Hawaiian Organic Act (48 U. S. C. 532) the privilege of the writ of habeas corpus was suspended until further notice and the Territory was placed under martial law (R. 12–14). On the same day the Governor telegraphed the President that he had declared martial law and suspended the privilege of the writ, and on December 9 the President approved the Governor's action (R. 61–62).

Following the Governor's proclamation on December 7, 1941, Lt. Gen. Walter C. Short, Commanding General, Hawaiian Department, acting as Military Governor, issued a public proclamation declaring that necessary ordinances governing the conduct of the people of the Territory would be published, and that offenders would be punished by military tribunals or held in custody until such times as the civil courts could function (R. 58–60). On December 7, 1941, General Short issued General Orders No. 4, establishing a system of military courts to try civilians for violations of laws of the United States and of the Territory, and rules, regulations, orders or policies of the military authorities, by the procedures prescribed for special and summary courts martial (*White* (No. 792, this Term), R. 79–81). On

December 8, 1941, by direction of the military authorities, the civil courts were closed (R. 594, 601; *White*, R. 81). General Orders No. 29, dated December 16, 1941, authorized the civil courts of the Territory to open to a limited extent for the trial of limited classes of cases not requiring jury trials or the subpoenaing of witnesses (*White*, R. 82–85). General Orders No. 57, dated January 27, 1942, authorized the civil courts, as agents of the Military Governor, to exercise their normal functions except for jury trials, writs of habeas corpus, and other specified classes of cases (*White*, R. 86–88). General Orders No. 133, dated August 31, 1942, extended the jurisdiction of the civil courts to jury trials, and General Orders No. 135, dated September 4, 1942, enumerated the criminal offenses, involving offenses against the government or related to the war effort, in respect of which the civil courts were not authorized to exercise jurisdiction (Appendix, p. 38). From December 7, 1941, to January 30, 1943, General Orders Nos. 1 to 181, inclusive, were issued for the governing of all persons within the Territory of Hawaii (R. 46).

On February 8, 1943, the Governor issued a public proclamation providing that, although martial law and suspension of the privilege of the writ of habeas corpus were to remain in effect, the Governor and other civilian officers and agencies could resume their respective jurisdictions with regard to various governmental functions, including criminal and civil judicial

proceedings (except for criminal proceedings against members of the armed forces and civil suits against them for any act or omission in the line of duty, or criminal prosecutions for violations of military orders, unless these exceptions were waived by the commanding general in any particular case or class of cases (R. 70–74)). On the same day, Lt. Gen. Emmons, who succeeded Lt. Gen. Short as Commanding General and Military Governor, issued a public proclamation relinquishing to the Governor and other civilian officers of the Territory the functions set forth in the Governor's proclamation (R. 77–81). These proclamations, which were made effective on March 10, 1943, were issued after protracted conferences among the Governor and representatives of the Departments of War, Interior, and Justice, held for the purpose of restoring civil functions to the civilian authorities as quickly as was practicable under the circumstances (R. 74–75). The proclamations received the personal attention of the President (R. 75–76).

Pursuant to the proclamations of February 8, General Emmons issued a revised set of General Orders Nos. 1 to 14, effective March 10, 1943, and rescinded General Orders Nos. 1 to 181, issued under the prior proclamation (R. 97–234, 226). General Orders No. 2 (R. 98–118) vested provost courts and military commissions with jurisdiction to try any case or proceeding involving violation by a civilian "of the rules, regulations, proclama-

tions, or Orders of the Military or Naval authorities, or of the Military Governor of the Territory of Hawaii, or of the laws of war," and to impose punishment by fine, imprisonment, or both (R. 99–100, 47–49, 98, 118). Lesser offenses were to be tried by provost courts (R. 101), which in adjudging sentences were to be guided, but not bound, by the penalties provided by the Courts-Martial Manual, the laws of the United States, the laws of the Territory of Hawaii, and the customs of law in like cases (R. 101). The maximum punishment for violation of General Orders not containing a different provision as to punishment, and the maximum punishment which a provost court could impose was confinement with or without hard labor for a period not to exceed five years, or a fine not to exceed five thousand dollars, or both (R. 101, 104). Provost courts were authorized to admit to bail persons charged with an offense punishable by such courts (R. 104), and their procedure was to follow, so far as it was feasible, the procedure used in summary courts-martial (R. 105).

Petitioner's offense.—A penal summons from the Military Governor to the petitioner, dated and served on February 29, 1944, commanded him to appear at the provost court at Pearl Harbor on March 1, to answer the charge of violating paragraph 8.01 of General Orders No. 2, which provided that no person shall commit an assault on any military or naval personnel

with intent to resist or hinder them in the discharge of their duty (R. 365–366). When the petitioner appeared in obedience to the summons, he was asked whether he desired counsel and whether he was ready to proceed with the trial; he stated that he did not desire counsel and was ready to proceed (R. 784). The trial was adjourned until March 2 because of the absence of the Government's witnesses (R. 785). At the trial Corp. Robert Bowerman, United States Marine Corps Reserve, and Pvt. James C. Hunter, United States Marine Corps Reserve, testified to the petitioner's assault upon them on February 24, 1944, while they were on duty guarding the main gate at the Pearl Harbor Navy Yard (R. 367–377). The petitioner then testified on his own behalf (R. 378–379). The court found the charges sustained by the evidence, adjudged the petitioner guilty, sentenced him to six months' confinement, and committed him to the custody of the respondent, Sheriff of the City and County of Honolulu, for execution of the sentence (R. 379–381).

On March 14, 1944, a petition for a writ of habeas corpus was filed in the United States District Court for the Territory of Hawaii alleging that the petitioner's trial and conviction by a provost court and imprisonment were unlawful and unconstitutional in that there existed no real or apparent threat of invasion of Hawaii,

that martial law did not lawfully exist within the Territory, and that irrespective of martial law there was no military necessity for the trial of the petitioner, a civilian, by a military tribunal (R. 4–8). The respondent's return and answer to an order to show cause why a writ should not issue (R. 2, 25–38) admitted that the federal and territorial criminal and civil courts were functioning (R. 7, 27–28), but denied that the petitioner's trial and imprisonment were unlawful and unconstitutional or that imminent danger of invasion had ceased or that martial law did not lawfully exist (R. 26–29). The return affirmatively alleged that under the proclamations of the Governor and of the Military Governor, issued on February 8, 1943, the suspension of the privilege of the writ and martial law continued and the civil courts were without jurisdiction to try violations of military orders (R. 70–74). The return further alleged, on belief and on information from the military authorities, that Hawaii had at all times since December 7, 1941, been in imminent danger of attack and that the public safety required the continued existence of martial law and suspension of the privilege of the writ (R. 43–44), that the provost courts were necessary and proper for the successful prosecution of the war (R. 47) and were established in good faith and in the honest belief that military necessity required them, and that the punishment in a provost court of persons assaulting military

sentries in the performance of their duties with intent to obstruct them was not unreasonable or arbitrary (R. 54).

The petitioner's traverse, filed on April 4, 1944, denied the military necessity for the petitioner's trial by a provost court and the existence of any imminent danger of invasion, within the meaning of Section 67 of the Hawaiian Organic Act, at the time of the alleged offense and of the provost court trial (R. 384). Upon the argument on March 31, 1944, the District Court determined that a writ should issue; it was made returnable immediately and the respondent produced the petitioner in court. Thereupon the court ordered that the petitioner be released pending determination of the case on furnishing a bond of $500.00. (R. 415.) It was stipulated that the return to the order to show cause and the traverse to this return should stand as a return to the writ and as a traverse to the return to the writ (R. 484–485).

The evidence produced at the hearing before the District Court may be conveniently divided into two parts, that relating to the question of imminent danger of invasion and the necessity for martial law, and that relating to the petitioner's assault on the marine sentries and the conduct of the provost court trial.

The military situation.—The evidence bearing on the military necessity for martial law and on the question of imminent danger of invasion consisted principally of the testimony of Admiral

Chester W. Nimitz, the Commander in Chief of the Pacific Fleet and of the Pacific Ocean Areas, Lt. Gen. Robert C. Richardson, Jr., United States Army, then Commanding General of the Central Pacific Area, and Governor Ingram H. Stainback.

Admiral Nimitz testified that the Hawaiian area constituted the only base for the Navy in the Pacific Ocean at that time, and that despite daily searches a Japanese surprise carrier attack on the Hawaiian Islands was within the enemy's capabilities (R. 1073–1076). He testified that while invasion by seaborne troops in sufficient number to seize a beachhead was not probable, invasion by submarine commando raiders and espionage parties was imminent and constantly impending, as well as invasion by carrier-borne aircraft (R. 1078).

General Richardson testified that the Hawaiian Islands are within the theatre of operations of the Pacific Ocean Areas, which is an active theatre of war (R. 1011), and that the Islands constitute the apex of a bastion, composed also of Alaska and the Panama Canal, upon which the safety of the West Coast of the continental United States depends (R. 1011–1012). He reviewed the Japanese military actions which had taken place in the Territory from the beginning of the war (R. 1013–1015). He testified that the Japanese fleet was still capable of making a surprise attack upon Oahu by the use of air or undersea craft, and that the danger of this type of invasion was always im-

pending and imminent even though the Japanese might not be capable of landing a large land-based force for the purpose of seizing the Islands (R. 1030–1031). He testified that Pearl Harbor is the most attractive target for the Japanese enemy because it is the base of the Pacific Fleet, and that it was likely that Japan would take the risk of launching an attack because of the attractiveness of the target and the considerable damage which might be inflicted (R. 1016–1018, 1031–1042). He stated that the Japanese fleet had the capabilities of launching an attack on Oahu and there was danger of such a surprise attack because it was impossible to patrol the whole surface of an area as large as the Pacific Ocean and because a Japanese carrier force could move close to Oahu without detection under cover of a "cold front", a large zone of mist which is a very common weather phenomenon in the area (R. 1019). Besides the possibility of striking from carriers, the Japanese could make use of submarines by which they could approach at night, launch boats, and send parties ashore in order to secure information of great military value or to attack important installations (R. 1019–1021).

On the question of the military necessity for provost courts, General Richardson testified that the discharge of his responsibility for military security required a method of enforcement of military security regulations which was prompt and subject to his immediate control and authority, and that un-

der martial law the provost courts provided such a method of enforcement. Speedy trial and punishment were deemed important in the enforcement of martial law. (R. 1026–1030.) He testified that in carrying out his responsibilities for military security he should not be required to rely upon other agencies for the enforcement of his security measures (R. 1052), and that the failure of the civil courts to deal adequately with violations of military security orders deemed necessary by the military commander would diminish his authority and his ability to discharge his military responsibilities (R. 1057). He testified that a military trial for the offense involved here was necessary in order to uphold the authority of military sentries who are charged with important military duties (R. 1050–1051). In this case the sentries were on duty at the main gate of the Pearl Harbor Navy Yard checking the identification of persons entering the Yard and preventing disturbances at a busy period of the evening (R. 779, 798–799, 898–899).

Governor Stainback testified that in his opinion public safety did not require the suspension of the privilege of the writ, and that there was no imminent danger of invasion (R. 826) and no military necessity for the trial of civilians in provost courts for offenses other than crimes against the laws of war (R. 825–828, 898–899). Judge Albert M. Cristy of the Circuit Court of the Territory testified that he did not believe that any

reason existed except military orders for the failure of the civil courts to resume the conduct of their business within a few weeks after the Pearl Harbor attack (R. 603–608).

The provost court trial.—The petitioner testified that he did not assault the two marine sentries.[1] The testimony of the sentries, however, clearly supported conviction of the offense which was tried before the provost court (R. 802–901). The petitioner challenged (R. 530) the correctness of the transcript of the testimony in the provost court, annexed to the return (R. 367–379) because of the allegation of the petition that he was tried upon a false charge in a provost court and was tried without counsel (R. 5–6). The accuracy of the transcript was established by the testimony of the court stenographer (R. 782–798), the provost court judge (R. 942), and Corp. Bowerman and Pvt. Hunter (R. 801, 899).

Captain J. Frank Wickhem, who served as Provost Court Commissioner for the Territory of

[1] The Government objected to the petitioner's testimony on the question whether the assault in fact occurred, on the basis of the clearly established rule that the only question in habeas corpus proceedings is whether the military tribunal had jurisdiction over the offense charged (R. 507–516). The petitioner argued, however, that the evidence would show that he had not in fact violated the General Orders and therefore the provost court lacked jurisdiction (R. 507–508). Thereupon the District Court overruled the Government's objection and allowed the testimony; the Government was unwilling to permit the petitioner's testimony that he had been falsely accused and unfairly tried in the provost court to go unchallenged on the record.

Hawaii, testified about the procedure in the provost courts as follows:

After a citation is given by the shore patrol, the military police, or the civil police to the defendant, he is requested or summoned to appear at the civil police station within 48 hours for booking; the charge is drawn, signed and verified; the defendant is then brought into court, arraigned, and informed that he has the right to counsel, and can call or subpena witnesses; the trial then commences if the defendant states he is ready; the trial is conducted according to the rules of evidence; the judgments are reviewed by officers on the staff of the Commanding General who can reduce any sentence or remit the fine (R. 910–912). The provost court judges are qualified attorneys, some of whom have had experience as judges in civil courts (R. 996–1001).[2]

Termination of martial law.—The District Court on April 20, 1944, sustained the writ, and discharged the petitioner from custody on his own recognizance pending appeal (R. 402–403). Prior to entry of the decree of the court below on November 1, 1944 (R. 1232), reversing the judgment of the District Court, the President on October 19, 1944, issued Proclamation No. 2627

[2] The petitioner's trial in the provost court was before Lt. Commander Arthur L. Mundo, a member of the bar of California as well as of this Court, who served from 1932 to 1942 as a judge of the Superior Court of the State of California, until he was recalled to active duty in the Navy (R. 940–941).

(9 F. R. 12831), providing that, effective October 24, 1944, the privilege of the writ was restored and martial law terminated. The Governor of Hawaii was directed to issue a proclamation accordingly.[3]

The rulings below.—The District Court held that the Governor's proclamation of February 8, 1943, terminated the suspension of the privilege of the writ (R. 395), relying on its earlier unreported decisions in *Ex parte Glockner* and *Ex parte Seifert*.[4] It held that the Constitution of the United States and the Hawaiian Organic Act authorize martial law only when conditions of disorder disrupt the orderly performance of civil

[3] In Executive Order No. 9489 (9 F. R. 12831), dated October 18 and effective October 24, 1944, the President also directed the Secretary of War to designate the Commanding General, United States Army Forces, Pacific Ocean Areas, which includes the Territory of Hawaii, as a military commander within the meaning of the Act of March 21, 1942 (18 U. S. C. Supp. III 97a) with authority to designate the Territory or any part thereof as a military area and to prescribe regulations on such matters as blackout and curfew periods, air raid precautions, exclusion of individuals from the Territory, possession of weapons, and related matters.

[4] These cases were dismissed by the District Court as moot because the petitioners, naturalized United States citizens of German ancestry interned as dangerous, were removed to the West Coast of continental United States and released. A petition for a writ of certiorari to review the legality of suspension of the privilege of the writ and the internment of another United States citizen as dangerous in Hawaii, was denied by this Court on the ground that release of the petitioner on the mainland made the case moot. *Zimmerman v. Walker*, 319 U. S. 744.

government (R. 398); that during 1943 and thereafter the civil government was fully capable of efficient operation; that although on March 2, 1944, and thereafter the Island of Oahu may have been subject to attack, it was not subject to imminent danger of invasion by hostile forces; and that martial law did not therefore lawfully exist and the provost court possessed no authority to try the petitioner (R. 401–402).

The Circuit Court of Appeals for the Ninth Circuit, in an opinion by Judge Healy, unanimously held that the military authorities were authorized to prescribe offenses interfering with military security and to make violations triable in military tribunals, and that the petitioner's imprisonment was therefore lawful (R. 1207–1208). In view of this conclusion on the legality of imprisonment, Judges Healy and Garrecht found it unnecessary to decide whether the emergency existing in the Territory as of the time of the filing of the petition was such as to warrant the then suspension of the writ (R. 1192). Judge Wilbur, in a concurring opinion in which Judge Matthews joined, stated that the suspension of the privilege of the writ was lawful, and furnished an additional ground for reversal of the district court's order (R. 1209). In a separate opinion Judge Denman held that the petition should be dismissed because on its face it failed to show facts warranting issuance of a writ (R. 1224).

DISCUSSION

The only question decided by a majority of the judges of the court below was that relating to the jurisdiction of the provost court to try the offense with which the petitioner was charged. If this Court should, upon a review of the case, find that the military court had jurisdiction, there would be no occasion to consider any question as to the legality of the suspension of habeas corpus. *Ex parte Quirin,* 317 U. S. 1, 25. If, however, the Court should conclude that the military tribunal lacked jurisdiction and that the petitioner was therefore being unlawfully held in custody, there would no longer be any reason why the petitioner should not be released on habeas corpus. As has been stated (*supra,* p. 14), the suspension of the writ has been terminated, and the Government would not oppose discharge of the petitioner if he should be found to be entitled thereto.

The question presented, therefore, is whether trial of the petitioner by a military court for the offense of committing an assault upon marine sentries on a military reservation with intent to hinder them in the performance of their duties, in violation of a military order making such an offense triable in the provost court, was authorized by law. Section 67 of the Organic Act of Hawaii empowers the Governor of Hawaii, "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it," to place the Territory under martial law "until

communication can be had with the President and his decision thereon made known." By the Governor's Proclamation of February 8, 1943, which was in effect when the petitioner was tried, a limited state of martial law still existed, under which military tribunals were authorized to try violations of military orders.

By empowering the Governor to place the Territory under "martial law" Section 67 of the Organic Act enables the Governor to assume temporarily for emergency purposes all the powers of the Territorial government. Martial law, in one of the accepted senses of that term, authorizes not only preventive custody of persons suspected of disloyalty or insurrection (*Moyer* v. *Peabody*, 212 U. S. 78; *Ex parte Zimmerman*, 132 F. (2d) 442 (C. C. A. 9), certiorari denied on the ground that the cause had become moot, 319 U. S. 744), but also trial and punishment of civilians by provost courts for criminal offenses, if such procedures are warranted by military necessity. See *Ex parte Milligan*, 4 Wall. 2, 129; *Ex parte Marais*, [1902] A. C. 109, 115; *In re Kalanianaole*, 10 Hawaii 29, 59–60; Richards, *Martial Law*, 18 Law Quarterly Review 133, 138–139 (1902); Fairman, *The Law of Martial Rule* (2d ed. 1943) pp. 167–173; Weiner, *A Practical Manual of Martial Law* (1940) p. 10.

Whether a particular exercise of martial law is valid depends upon the existence of a reasonable basis for the determination that military necessity

requires the exercise of martial law involved. *Sterling* v. *Constantin*, 287 U. S. 378; *Dooley* v. *United States*, 182 U. S. 222, 234; *United States* v. *Dickelman*, 92 U. S. 520, 526; *Raymond* v. *Thomas*, 91 U. S. 712, 716; *Mitchell* v. *Harmony*, 13 How. 115; *Luther* v. *Borden*, 7 How. 1. Mr. Justice Holmes stated the applicable principle as follows (*Moyer* v. *Peabody*, 212 U. S. 78, 85):

> When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.

The President of the United States and the Governor of Hawaii acted upon the basis of a determination by the persons directly responsible for the security of Hawaii, as well as the continental United States, that, as of the time this case was tried by the military court, there still existed an imminent danger of invasion and the public safety required continuation of a limited state of martial law. While martial law was progressively relaxed, it was not until October 19, 1944, that the President felt justified in ordering complete termination of martial law in Hawaii, in view of the improved military situation in the Pacific. No one will deny that on December 7, 1941, and for some indeterminate period thereafter, martial law in Hawaii was justified by the circumstances.

The question is, at what point after December 7, 1941, did the military situation become so improved as to require complete termination of martial law?

The question has two aspects, first, of determining what the actual facts were, and, secondly, of exercising a responsible judgment on the basis of such facts. The President, the Governor, and the military authorities were peculiarly in a position to know the facts. The decisions with respect to the termination of martial law in Hawaii were made, as the record shows, only after deliberate consideration of all the relevant factors and after extended consultations among the agencies of the Government responsible for the military security of Hawaii. Future historians may be able to look back and say that those responsible for making these decisions erred on the side of caution and took too pessimistic a view of the military dangers and the necessity for minimizing such dangers by continuing some degree of martial law. The question here presented, however, is whether this Court should undertake to inquire into so much of the factual situation as is now open to judicial scrutiny, and upon the basis of such an inquiry, determine as a matter of law whether those responsible for the security of the Nation made an erroneous exercise of judgment in concluding that the military situation in the Pacific had not, prior to October 19, 1944, improved to

such an extent as to warrant the complete termination of martial law in Hawaii.

It cannot be gainsaid that, stated abstractly, the question presented is important. But its importance has been substantially diminished since the dissolution of martial law in Hawaii. The situation in Hawaii resulting from the attack on Pearl Harbor created problems of an extremely difficult and delicate character. Many conflicting interests had to be reconciled, the most important of which was the security of the Nation. Few guiding precedents were available, and the risks involved were great, no matter which course was to be taken. Fortunately, the problems have now been resolved, and the extent of the dislocations produced by the security measures adopted can be said to be rather small. There are sixteen persons presently held in custody upon convictions by military courts. The sentences of all but four of these will, with allowances for good conduct, expire during the present year. No claim is made that the petitioner was not fairly tried, and that all the basic requirements of procedural due process, including the right to counsel of his own choice and the opportunity to prepare a defense and to examine witnesses, were not satisfied.

With respect to the Territory of Hawaii, Congress has embodied in Section 67 of the Hawaiian Organic Act a legislative judgment that martial law is reasonable and constitutional in Hawaii when invasion is imminent as well as when it is

actually in progress.[5] The uncontradicted testimony of the military and naval authorities at the trial was that the Territory was, and had been since December 7, 1941, in imminent and constant danger of a large-scale bombardment from the air, as well as incursions by commando raiders and reconnaissance parties landing from submarines. It is not necessary to emphasize the crucial importance of Hawaii in the conduct of the war against Japan. As General Richardson stated, it is the apex of the bastion of defenses of the West Coast of the continental United States (R. 1012). In the words of Admiral Nimitz, Hawaii was "the only base for the Navy that we have in the Pacific Ocean at the present time" (R. 1073). The resulting necessity for using every means to secure Hawaii against invasion was increased by the fact that some part, whether large or small, of its large population of Japanese ancestry could not be assumed to be wholly loyal to the United States. The Territorial Legislature in its 1943 amendment to the Hawaiian Defense Act described the unusual situation then prevalent in Hawaii in these terms: "the existence of a state of war, the geographical

[5] The Constitutions of the Kingdom of Hawaii permitted the existence of martial law only in case of actual rebellion or invasion (Constitutions of the Kingdom of Hawaii,—for 1852, Art. 39; for 1864, Art. 37; for 1887, Art. 37). In Article 31 of the Constitution of the Republic of 1894, adopted after the *Milligan* decision, the provision was changed to permit such exercise in the case of imminent danger as well.

position of Hawaii, its importance as a strategic base for the armed forces of the United States [and] the presence of a large number of members of the armed forces and civilian war workers in addition to its normal civilian population * * *." (Act 96, approved April 30, 1943, Session Laws of Hawaii, 1943.)

In a military base of such importance the Commanding General's control over the civilian population could reasonably have been considered essential to a complete state of preparedness and thus to have been required by the public safety when invasion was imminent. If it was not unreasonable for the Commanding General to believe that the public safety required him to punish offenses interfering with the effective performance of duty by military and naval personnel, it was not improper to make such offenses triable by military courts. The civil courts had no jurisdiction to try such offenses. And, in any event, the expeditious trial of persons accused of interfering with military and naval personnel in the performance of their duties could reasonably have been considered necessary to the safety of the Territory, in order to secure the full deterrent effect on the civilian population of the knowledge that offenders would speedily be brought to trial (see testimony of General Richardson, R. 1028). Military procedure is obviously less subject to the kind of delays which may occur in a civil trial.

See King, *Legality of Martial Law in Hawaii*, 30 California Law Review (1942) 599, 611.

An inquiry into whether the public safety no longer required the continuation of a state of martial law which was admittedly valid in its inception, is one with respect to which the judicial power to review should be exercised with particular hesitation. The practical difficulties involved in an attempted judicial re-examination of the requirements of the public safety are readily apparent. An effective system of military control had to be worked out carefully and in detail. It could not be abandoned with every improvement in the military situation and restored with every unfavorable development. As the court below observed (R. 1196), "the situation was such that informed leadership would be answerable at the bar of history if it presumed to take unnecessary chances."

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
HERBERT WECHSLER,
Assistant Attorney General.
EDWARD J. ENNIS,
Special Assistant to the Attorney General.

JANUARY 1945.

APPENDIX

CONSTITUTION OF THE UNITED STATES

Art. I, Sec. 9, Cl. 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

THE ORGANIC ACT OF HAWAII

The Act of April 30, 1900, c. 339, 31 Stat. 141, provides in part as follows:

> SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: *Provided,* That sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the Territory of Hawaii.
>
> * * * * * *
>
> SEC. 67. That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress law-

less violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

PROCLAMATIONS

PROCLAMATION 2627

TERMINATION OF MARTIAL LAW IN THE TERRITORY OF HAWAII

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA—A PROCLAMATION

WHEREAS the armed forces of the Empire of Japan having attacked and invaded the Territory of Hawaii, and the public safety requiring it, the Governor of the Territory of Hawaii, acting under the authority vested in him by section 67 of the act of April 30, 1900, 31 Stat. 153 (48 U. S. C. 532), did, by proclamation dated December 7, 1941, suspend the privilege of the writ of habeas corpus and did place the said Territory under martial law until communication could be had with the President and his decision thereon made known; and

WHEREAS communication was had with the President and his decision approving the said action of the Governor of the Territory of Hawaii was made known to the Governor on December 9, 1941; and

WHEREAS the public safety no longer requires that the privilege of the writ of habeas corpus remain suspended or that martial law continue in the said Territory:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of April 30, 1900, do proclaim that the privilege of the writ of habeas corpus is hereby restored and that martial law is hereby terminated in the Territory of Hawaii, and I do hereby direct the Governor of the Territory of Hawaii so to proclaim to the people of the Territory of Hawaii.

This Proclamation shall become effective October 24, 1944.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 19th day of October in the year of our Lord nineteen hundred and forty-four, and of the Independence of the United States of America the one hundred and sixty-ninth.

FRANKLIN D. ROOSEVELT

By the President:
CORDELL HULL,
Secretary of State.

BY THE GOVERNOR OF HAWAII—A PROCLAMATION

WHEREAS the Governor of Hawaii by proclamation of December 7, 1941, in the exercise of his powers under Section 67 of the act of April 30, 1900, 31 Stat. 153 (48 U. S. C. 532), suspended the priv-

ilege of the writ of habeas corpus and placed the Territory of Hawaii under martial law, which action was approved by the President of the United States of America on December 9, 1941; and

WHEREAS by proclamation dated October 18, 1944, the President of the United States of America makes known that the public safety no longer requires that the privilege of the writ of habeas corpus remain suspended or that martial law continue in the Territory of Hawaii, and proclaims that the privilege of the writ of habeas corpus is restored and that martial law is terminated in the Territory of Hawaii:

NOW, THEREFORE, I, Ingram M. Stainback, Governor of Hawaii, do hereby proclaim to the people of the Territory of Hawaii that the privilege of the writ of habeas corpus is restored and that martial law is terminated throughout the Territory of Hawaii.

DONE at Iolani Palace, Honolulu, Territory of Hawaii, this 24th day of October, 1944.

INGRAM M. STAINBACK.

EXECUTIVE ORDER NO. 9489

AUTHORIZING AND DIRECTING THE SECRETARY OF WAR TO DESIGNATE A MILITARY COMMANDER FOR THE TERRITORY OF HAWAII AND AUTHORIZING THE MILITARY COMMANDER TO PRESCRIBE SAID TERRITORY, OR ANY PART THEREOF, AS A MILITARY AREA, AND FOR OTHER PURPOSES

WHEREAS the defense of the Territory of Hawaii and the successful prosectuion of the war require every possible protection against espionage and sabotage, the maintenance of internal security,

and the efficient utilization of available facilities in that territory:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution, the laws of the United States, including the act of March 21, 1942, c. 191, 56 Stat. 173 (18 U. S. C. 97a), and Title III of the Second War Powers Act, 1942, and as Commander in Chief of the Army and Navy and as President of the United States, I order as follows:

1. I hereby authorize and direct the Secretary of War to designate the Commanding General, United States Army Forces, Pacific Ocean Areas, as the military commander within the meaning of the act of March 21, 1942. The military commander may prescribe the Territory of Hawaii or any part thereof as a military area, from which any and all persons may be excluded and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions or orders the said military commander may impose as hereinafter authorized.

2. In the military area prescribed under the authority of this order, the military commander may, whenever military necessity therefor exists and the military commander so finds:

a. Establish blackout and curfew periods and restrict and regulate the actions of all persons during such period.

b. Establish air raid precautions.

c. Regulate the conduct of enemy aliens.

d. Evacuate or exclude, and detain incident thereto, any or all persons from the military area or from any part thereof, whenever the evacuation or exclusion, or the detention incident thereto, is necessary to prevent espionage or sabotage, and the military commander so finds.

e. Regulate or prohibit possession or use of firearms or other weapons.

f. Define, for the purposes of this order, what shall constitute military service with the armed forces of nations other than the United States and require all persons who have had such military service with the armed forces of nations other than the United States to register such military service.

g. Issue regulations to assure adequate protection of the following: ports and harbors, dockage and stevedoring, barges, tugs and floating equipment, transportation of ship cargoes and passengers, and disposition of all cargoes until removed from dock areas at docks and wharves.

h. Regulate, restrict, or prohibit travel within, into, or from the military area whenever such regulation, restriction, or prohibition is necessary for military security, and the military commander so finds.

i. Whenever necessary to prevent espionage or sabotage, and the military commander so finds, regulate the publication of any newspapers and periodicals that are published in a foreign language or in dual languages, regulate, restrict, or prohibit the possession or use of radio transmission sets or the transmission of information (by any means other than newspapers) between the military area and points outside of the said area, and between the islands within the said military area.

3. Whenever the military commander finds it to be in the interests of national defense and the successful prosecution of the war, he may, to the

extent that he deems it necessary to carry out the purposes of this order, perform the functions and exercise power and authority conferred on the President by Title III of the Second War Powers Act, 1942 (50 U. S. C., app. 633) insofar as they relate to priorities and allocation of the following in the Territory of Hawaii: Ports and harbors, dockage and stevedoring, barges, tugs, floating equipment and all travel facilities; and fixing of over-all quotas to vessels of all commercial cargo.

4. Nothing in this order shall be construed to modify or revoke any of the provisions of Executive Order No. 9066, dated February 19, 1942. Any designation of the military commander and of the Territory of Hawaii or any part thereof as a military area under paragraph 1 hereof shall constitute designation of such military commander as the military commander, and of such Territory or such part thereof as a military area for the purposes of the said Executive Order No. 9066, and shall vest the military commander with the powers provided in that order.

5. Unless sooner terminated, the authority herein conferred shall expire thirty days after the cessation of hostilities between the Empire of Japan and the United States.

6. All prior Executive orders, insofar as they are in conflict herewith, are amended accordingly.

7. This order shall become effective on October 24th, 1944.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
October 18, 1944.

WAR DEPARTMENT,
WASHINGTON, D. C., *24 October 1944.*

Lieutenant General ROBERT C. RICHARDSON, Jr.,
Commanding General, United States
Army Forces, Pacific Ocean Areas.

DEAR GENERAL RICHARDSON: In accordance with the authority conferred on me by Executive Order No. 9489, dated October 18, 1944, issued pursuant to the provisions of the Act of Congress approved March 21, 1942 (Ch. 191, 56 Stat. 173, 18 U. S. C., Sec. 97a), I hereby designate you as the Military Commander of the Territory of Hawaii, with full power to prescribe the Territory of Hawaii or any part thereof a military area within the meaning of the Act of Congress and the Executive Order above referred to, and to exercise therein any and all of the powers conferred by that Act and the said Executive Order.

Sincerely yours,

(S) HENRY L. STIMSON,
Secretary of War.

PUBLIC PROCLAMATION NUMBER ONE

24 OCTOBER 1944.

To: The People Within The Territory of Hawaii,
And To The Public Generally:

WHEREAS, national-defense material, national-defense premises, and national-defense utilities, as defined by Section 4, Act of April 20, 1918, Chapter 59, 40 Stat. 533, as amended by the Act of November 30, 1940, Chapter 926, 54 Stat. 1220, and the Act of August 21, 1941, Chapter 388, 55 Stat. 655 (USC, Title 50, Section 104), are lo-

cated within the Territory of Hawaii, are subject to attack by the armed forces of the Empire of Japan with which the United States is at war and are subject to espionage and acts of sabotage; and,

WHEREAS, by Executive Order No. 9489 dated October 18, 1944, the President of the United States authorized and directed the Secretary of War to designate The Commanding General, United States Army Forces, Pacific Ocean Areas, as the Military Commander within the meaning of the Act of March 21, 1942, Chapter 191, 56 Stat. 173, USC, Title 18, Section 97a, and provided that the said Military Commander may prescribe the Territory of Hawaii or any part thereof as a military area within the meaning of the said Act from which any and all persons may be excluded and with respect to which the right of any person to enter, to remain in or leave shall be subject to whatever restrictions or orders the said Military Commander may impose as authorized in said Executive Order; and,

WHEREAS, the Secretary of War on 24 October 1944 designated the undersigned, The Commanding General, United States Army Forces, Pacific Ocean Areas, as the Military Commander to carry out the functions, duties and powers imposed by the said Executive Order; and,

WHEREAS, in order to secure every possible protection for said national-defense material, national-defense premises, and national-defense utilities against espionage and sabotage, to secure the maintenance of military and internal security, the efficient utilization of available facilities in the Territory of Hawaii, and to successfully prose-

cute the war, it is required by military necessity that the Territory of Hawaii be prescribed a military area within the meaning of the said Executive Order and the said Act of March 21, 1942, Chapter 191, 56 Stat. 173, USC, Title 18, Section 97a, and that the security orders hereinafter set forth be issued and made applicable to the said military area prescribed herein:

NOW, THEREFORE, I, ROBERT C. RICHARDSON, JR., Lieutenant General, United States Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Pacific Ocean Areas, do hereby declare and proclaim that:

1. The present situation requires as a matter of military necessity the establishment of the Territory of Hawaii as a military area, and, based upon the findings above set forth and for the purposes aforesaid, I hereby prescribe the Territory of Hawaii as a military area to be designated and known as the Territory of Hawaii Military Area.

2. The right of any person to enter, remain in, or leave the Territory of Hawaii Military Area or any part thereof designated hereafter in this Proclamation or any subsequent Proclamation shall be subject to the provisions of this Proclamation No. 1 and Security Orders Nos. 1 to 7 inclusive as hereinafter set forth which are hereby promulgated and declared effective from the date of this Proclamation, and shall be further subject to the provisions of any subsequent Proclamations, restrictions, orders, rules, regulations, or instructions which may hereafter

be promulgated by undersigned Military Commander.

In addition thereto, any person who fails to comply with or violates any provisions of any Proclamations, restrictions, orders, rules, regulations or instructions issued or adopted by the undersigned Military Commander, Territory of Hawaii Military Area, pursuant to the authority cited in the preamble of this Proclamation, applicable to the whole or any part of the Territory of Hawaii Military Area, including any district, or restricted area thereof, is subject to the penalties provided by Public Law No. 503 of the 77th Congress approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with respect to persons entering, remaining in, leaving, or committing any act in Military Areas or Zones." providing therein a fine of not to exceed $5,000.00, or to imprisonment for not more than one year, or both, for each offense.

If two or more persons conspire to violate Public Law No. 503 and one or more do any act to effect the object of such conspiracy, each of the parties will be subject to the penalties provided by Title 18, Section 88, United States Code.

Whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of the Military Commander of the Territory of Hawaii Military Area shall be subject to the penalties provided by Title 18, Section 80, United States Code.

In the case of an alien enemy, such persons will in addition be subject to immediate apprehension and internment.

3. Any or all persons will be ordered excluded or evacuated from the Territory of Hawaii Military Area or from any part thereof by the undersigned Military Commander whenever such evacuation or exclusion is necessary to prevent espionage or sabotage. Incident to such exclusion or evacuation such persons will be subject to detention. No person who has been ordered excluded or evacuated from the Territory of Hawaii Military Area or from any part thereof by the undersigned Military Commander, in accordance with the provisions of this paragraph, shall enter, or remain in the Territory of Hawaii Military Area or in such part thereof.

4. Nothing contained herein shall be construed as limiting or modifying the rights, powers, duties and responsibilities of the undersigned Military Commander as Commanding General, Pacific Ocean Areas, to prescribe regulations for the conduct and control of alien enemies, and the apprehension and internment of such alien enemies as are subject to apprehension and internment in the judgment of the undersigned Military Commander as Commanding General, Pacific Ocean Areas, duly authorized by the Secretary of War and pursuant to the Proclamations of the President of the United States dated December 7, 1941 and December 8, 1941.

5. It shall be the duty of every person found within the Territory of Hawaii Military Area or any part thereof, to familiarize himself with the terms of this Proclamation and the restrictions,

orders, rules, regulations and instructions hereinafter contained and which may hereafter be issued and promulgated by the undersigned Military Commander.

6. The Executive of the Military Commander, Territory of Hawaii Military Area, is hereby designated, authorized and empowered to issue the orders of the Military Commander relative to all matters relating or pertaining to functions, powers, duties and responsibilities of the said Military Commander under Executive Order No. 9489, dated October 18, 1944.

7. Unless otherwise clearly indicated in the Proclamation, restriction, order, rule, regulation or instruction in which used, the term "person" as used in any Proclamations, restrictions, orders, rules, regulations or instructions of the undersigned Military Commander shall include and hereby is defined to mean, any natural person or persons, firms, associations, trusts, corporation or corporations, or any agent, servant, employee, or representative of any of the foregoing.

ROBERT C. RICHARDSON, JR.,
Lieutenant General, United States Army;
Commanding General, United States
Army Forces, Pacific Ocean Areas;
Military Commander, Territory of Hawaii Military Area.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
IOLANI PALACE

HONOLULU, T. H., *31 August 1942.*

GENERAL ORDERS
No. 133

SECTION I. DECLARATION AND FINDING.
SECTION II. OPERATION OF THE CIVIL COURTS.
SECTION III. FUTURE MODIFICATION OF THIS ORDER.

SECTION I. DECLARATION AND FINDING.—Hawaii constitutes the main Pacific outpost of the United States, and accordingly must be regarded as a fortress to whose defense the entire population of the Islands is committed. Its manpower and its economic resources must be subject to a single ultimate control. Martial law has been declared and the emergency which called it forth still prevails. The privilege of the writ of habeas corpus has been suspended and remains suspended. For all this there is authority in Section 67 of the Organic Act. The measures of military control have from time to time been modified in the light of experience and as changes in conditions have dictated. By General Orders No. 29 of December 16, 1941, the civil courts were reopened, subject to certain restrictions. It is now consistent with the public safety and the national defense that they be permitted more fully to exercise the powers normally exercised by them. They cannot, however, be allowed to interfere with the measures required by military security. It is to be understood that the relaxation herein specified is intended to return to the courts criminal prosecu-

tions and civil litigation to the extent that war conditions permit. However, this action is experimental in nature and the Military Governor reserves the right further to limit the jurisdiction of the courts or to close them entirely, if that course shall be necessary.

SECTION II. OPERATION OF THE CIVIL COURTS.—In accordance with the above declaration and finding, the civil courts are now authorized to exercise their normal jurisdiction, subject, nevertheless, to the following restrictions and limitations:

1. The privilege of the writ of habeas corpus has been and remains suspended.

2. No criminal proceeding shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor.

3. No civil suit, action or other proceeding shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor for any act done within the scope of such employment.

4. (a) No judgment by default shall be entered against any person who is in the Army, Navy, Marine Corps, or Coast Guard of the United States. No judgment by default shall be entered against any person employed or engaged in any occupation, business, or activity under the supervision or direction of the Military Governor, or otherwise essential to the national defense, until seven (7) days shall have elapsed after the return

day provided in the summons or by the statutes of the Territory of Hawaii. A default judgment hereafter entered shall be set aside upon the mere request of the defendant or his attorney, made either orally or in writing, to the court, or clerk thereof, in which the case was pending at the time of the entry of such judgment, if such request be so made within fifteen days after entry of such default judgment. Leave to appear or answer shall be allowed or extended for a like period of fifteen days after such default judgment shall have been set aside. In the event the defendant, after having been allowed to so appear or answer as aforesaid, shall fail to so appear or answer as aforesaid within said period of fifteen days, the court again may enter or cause to be entered the default of the defendant and enter or order entered judgment by default against such defendant. A defendant shall have no right upon his mere request to have a default judgment set aside a second time in the same case.

(b) The provisions contained in this paragraph shall apply to pending cases as well as to cases hereafter commenced or instituted.

(c) A verbatim copy of the contents of this paragraph shall be attached to the summons and served upon the defendant or defendants in cases hereinafter commenced or instituted.

5. No person referred to in paragraphs 2 and 3 of this section, with respect to whom a certificate or exemption is issued by the Military Governor or under his authority, shall be selected or listed by any jury commission as a trial juror or grand juror and no subpoena issued to require the attendance of any such person in such courts shall be valid. Based upon the requirements for labor

in the National Defense, the Military Governor will from time to time prescribe the maximum number of persons who may be summoned or held for jury service.

6. (a) No person, firm, or corporation shall institute, maintain, or prosecute any action, suit or other proceeding in any circuit or district court in the City and County of Honolulu, Territory of Hawaii, to recover the possession of any premises used for housing accommodations as defined in Section 1, Ordinance 941 of the City and County of Honolulu, Territory of Hawaii, without first having obtained an order of the Rent Control Commission of said City and County of Honolulu that said plaintiff or plaintiffs is or are entitled to the possession of said premises, and no such suit, action, or other proceeding shall be instituted, maintained, or prosecuted for the purpose aforesaid in any such said circuit or district court without such order having been first obtained by the said plaintiff or plaintiffs in such suit, action, or other said proceeding.

(b) This section shall be retroactive and shall be deemed to have been in full force and effect as of and after January 27, 1942, and shall be retroactive and applicable to any such action, suit, or proceedings, now pending in said circuit and district courts as well as to those hereafter instituted, maintained, or prosecuted in said circuit and district courts.

(c) Payments of rent shall continue to be made at the dates the rent becomes due on all housing accommodations in accordance with the agreement or procedure previously effected by the parties thereto. Landlords shall refund any unused portions of rent paid in advance to any tenants who

are duly evacuated from the Territory of Hawaii.

7. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued will continue to be triable by Military Commissions or Provost Courts.

8. The Military Governor may waive any restriction or limitation established by the foregoing paragraphs, with respect to any person, case, or matter, or class of persons, cases, or matters.

SECTION III. FUTURE MODIFICATION OF THIS ORDER.—This order shall be subject to modification or revocation, by the Military Governor whenever in his judgment such action is necessary.

All prior orders inconsistent herewith are hereby revoked.

SECTION IV. EFFECTIVE DATE.—This General Order is effective 12:00 noon, 2 September 1942.

By order of the Military Governor:

(signed) THOMAS H. GREEN,
Thomas H. Green,
Brigadier General, A. U. S.,
Executive.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
IOLANI PALACE

HONOLULU, T. H., *4 September 1942.*

GENERAL ORDERS
No. 135

JURISDICTION OF COURTS.—1. *Criminal Jurisdiction: General.* This General Order is issued to define the criminal jurisdiction to be exercised by the Federal and Territorial courts and the courts established by the Military Governor, in accord-

ance with General Orders No. 133, this office, 31 August, 1942.

2. *Jurisdiction of Federal Courts.* The United States District Court for the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. 10 USCA Section 1393 (Protection of uniform of the Army, Navy, Marine Corps, etc.); 18 USCA Sections 1 to 17 inclusive (Offenses against the existence of the Government); 18 USCA Section 76a and 76b (Prohibiting reproduction of official badges, identification cards, and other insignia); 18 NSCA Sections 94 to 98 inclusive (Offenses against the operations of the Government, such as enticing desertion from the Army or Navy, etc); 50 USCA Sections 31 to 36 inclusive (Espionage); 50 USCA Sections 45 to 45d inclusive (Photographing, etc., defensive installations); 50 USCA Section 101 to 106 inclusive (Wilful destruction, etc., of war or national defense material); Violations of the Selective Training and Service Act of 1940; and Federal statutes relating to Prostitution;

b. All other Federal Statutes heretofore enacted, although not hereinabove enumerated, and all other Federal Statutes hereafter enacted of the class of criminal offenses herein set forth, or relating to offenses directed against the Government, or violations in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

3. *Jurisdiction of Territorial Courts.* All courts of the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. Chapter 163, R. L. H. 1935 (Anarchistic Publications and Criminal Syndicalism); Chapter 178, R. L. H. 1935 (Disloyalty and desecration of flag); Chapter 180, R. L. H. 1935 (Disorderly House and Drunkenness); Chapter 199, R. L. H. 1935 (Military organizations); Chapter 205, R. L. H. 1935 (Riots, unlawful assemblies); Chapter 208, R. L. H. 1935 (Secret Associations); Chapter 214, R. L. H. 1935 (Vagrants, Disorderly persons, Loitering); Section 5710, R. L. H. 1935 (Places of Prostitution, etc.); Violations of any law, rule or regulation of the Territory or ordinance of any county or city and county relating to public health; assault or assault and battery on police officers or other law enforcement officers in violation of Section 5657, R. L. H. 1935; Act 128, S. L. H. 1937 (Carrying Deadly Weapons); Act 82, S. L. H., 1941 (Sabotage); Violations of traffic ordinances of any county or city and county relating to drunken driving; Violations of territorial traffic laws or traffic ordinances of any county or city and county during blackout hours as established by the Military Governor or during periods of alert as announced by the Military Governor;

b. All other Territorial statutes, county or city and county ordinances, rules and regulations heretofore enacted, or promulgated although not hereinabove enumerated, and all other Territorial statutes hereafter enacted or promulgated of the class of criminal offenses herein set forth, or re-

lating to offenses directed against the Federal or Territorial Governments, or relating to offenses in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

4. *Jurisdiction over Persons.* The Federal and Territorial courts shall not assume criminal jurisdiction over the following persons except when authority to do so is first obtained from the Military Governor:

a. Members of the armed forces of the United States;

b. Persons employed or engaged in any occupation, business, or defense activity under the direction of the Army, Navy or Military Governor where the offense is committed within the scope of their employment. The determination of the status of such persons, and whether an offense is committed within the scope of employment shall rest with the Military Governor whose decision shall be final.

5. *Jurisdiction of Military Commissions and Provost Courts Retained.* Military Commissions and Provost Courts shall retain and exercise all jurisdiction and powers heretofore granted them by the Military Governor except as otherwise provided herein.

6. *Determination of Jurisdiction where Questioned.* Whenever the jurisdiction of the Federal or Territorial Courts, or Military Commissions or Provost Courts, to hear and determine any case

shall in any manner or for any reason be questioned, then in every such case, the issue of jurisdiction shall be determined by the Military Governor whose decision shall be final; and, notwithstanding any other provision of this or any other order of the Military Governor, the Federal or Territorial Court, or Military Commission or Provost Court, as the case may be, shall take, have and exercise jurisdiction in accordance with such determination and decision.

7. *Special Cases.* Notwithstanding any provision of this or any other order of the Military Governor to the contrary, the Military Governor may, whenever in his opinion such action be necessary in the public interest, exercise jurisdiction at any time over any crime or offense or person, and direct that the same be tried before a Military Commission or Provost Court.

8. *Future Modification of this Order.* This order shall be subject to modification or revocation, by the Military Governor whenever in his judgment such action is necessary.

9. *Effective Date.* This order shall take effect forthwith. Criminal cases pending before the Provost Courts and Military Commission of the class which is within the jurisdiction herein given to the Federal and Territorial courts and in which no plea has been entered shall be tried and determined by the Federal or Territorial court, as the case may be.

By order of the Military Governor:

(signed) THOMAS H. GREEN,
Thomas H. Green,
Brigadier General, A. U. S.,
Executive.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1945

LLOYD C. DUNCAN, PETITIONER

v.

DUKE PAOA KAHANAMOKU, SHERIFF, CITY AND COUNTY OF HONOLULU

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 389) is not reported. The opinions rendered in the Circuit Court of Appeals (R. 1188) are reported at 146 F. (2d) 576.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 1, 1944 (R. 1232). The petition for a writ of certiorari was filed on December 29, 1944 and was granted on February 12, 1945 (R. 1234). The jurisdiction of this Court

rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a military provost court, established by the military commander under martial law proclaimed by the Governor of Hawaii and approved by the President under the Hawaiian Organic Act (48 U. S. C. 532), had lawful power to try the petitioner, a civilian, for assault upon military sentries on a military reservation with intent to hinder them in the performance of their duties in violation of an order of the military commander which made such an assault, wherever committed within the Territory of Hawaii, a criminal offense triable in the provost court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are printed in the Appendix (*infra*, pp. 80–83).

STATEMENT

The petitioner was convicted on March 2, 1944, in the Provost Court for the Island of Oahu, Territory of Hawaii, for the offense of assaulting two United States Marine Corps sentries on February 24, 1944 (R. 380) at the main gate of the Navy Yard at Pearl Harbor on the naval reservation, with intent to hinder them in the lawful discharge of their duties, in violation of paragraph 8.01 of General Orders No. 2 of the

Military Governor of Hawaii, dated March 10, 1943 (R. 110).

Before stating the facts of the petitioner's case as brought forth in the provost court trial and at the hearing in this habeas corpus proceeding, it may be helpful to set forth the authority under which the provost court had been established and operated.

1. Martial law in Hawaii

Establishment of Martial Law.—On December 7, 1941, after the Japanese attack on Pearl Harbor, Governor Poindexter of Hawaii issued a public proclamation stating that pursuant to Section 67 of the Hawaiian Organic Act (*infra*, p. 82) the privilege of the writ of habeas corpus was suspended until further notice and the Territory was placed under martial law (R. 12–14). In that Proclamation the Governor also requested the Commanding General, Hawaiian Department, during the emergency and until danger of invasion was removed, to exercise all the powers normally exercised by the Governor and by the judicial officers and employees of the Territory and such other and further powers as the emergency might require (R. 13). On the same day the Governor telegraphed the President that he had declared martial law and suspended the privilege of the writ, and on December 9 the President telegraphed his approval of this action of the Governor (R. 61–62).

Following the Governor's proclamation on December 7, 1941, Lt. Gen. Walter C. Short, Commanding General, Hawaiian Department, issued a public proclamation declaring that in compliance with the aforesaid requests of the Governor he was assuming the position of Military Governor, that necessary ordinances governing the conduct of the people of the Territory would be published, and that offenders would be punished by military tribunals or held in custody until such times as the civil courts could function (R. 58–60). On the same day General Short issued General Orders No. 4, establishing a system of military courts to try civilians for violations of laws of the United States and of the Territory, and of rules, regulations, orders or policies of the military authorities, by the procedures prescribed for special and summary courts martial. (Pet. Brief, Appendix, p. iv).

On December 8, 1941, an order of the Chief Justice of the Supreme Court of the Territory stated that under the direction of the Commanding General all courts of the Territory would be closed until further notice (*White* v. *Steer*, No. 15 this Term, R. 81) and the civil courts were immediately replaced by provost courts (R. 594, 601).

Modification of Martial Law.—General Orders No. 29, dated December 16, 1941, authorized the civil courts of the Territory to open to a limited extent for the trial of limited classes of cases not

requiring jury trials or the subpoenaing of witnesses (*White* R. 82–85). General Orders No. 57, dated January 27, 1942, authorized the civil courts, as agents of the Military Governor, to exercise their normal functions except for jury trials, habeas corpus proceedings, and other specified classes of cases (*White* R. 86–88). General Orders No. 133, dated August 31, 1942, extended the jurisdiction of the civil courts to jury trials, and General Orders No. 135, dated September 4, 1942, enumerated the criminal offenses, involving crimes against the Government or related to the war effort, in respect of which the civil courts were not authorized to exercise jurisdiction (Appendix, pp. 86–94). From December 7, 1941, to January 30, 1943, General Orders Nos. 1 to 181 inclusive, were issued for the Territory of Hawaii (R. 46).

On February 8, 1943, Governor Stainback, who had succeeded Governor Poindexter, issued a public proclamation providing that, although martial law and suspension of the privilege of the writ of habeas corpus were to remain in effect, the Governor and other civilian officers and agencies would resume their respective jurisdictions with regard to various governmental functions, including criminal and civil judicial proceedings, except for criminal proceedings against members of the armed forces and civil suits against them for acts or omissions in the line of duty and criminal

prosecutions for violations of military orders, except as these exceptions might be waived by the commanding general in any particular case or class of cases (R. 70–74). On the same day, Lt. Gen. Emmons, who had succeeded Lt. Gen. Short as Commanding General and Military Governor, issued a public proclamation relinquishing to the Governor and other civilian officers of the Territory the functions set forth in the Governor's proclamation (R. 77–81). These proclamations, which were made effective on March 10, 1943, were issued after protracted conferences among the Governor and representatives of the Departments of War, Justice and Interior, held for the purpose of restoring civil functions to the civilian authorities as quickly as practicable under the circumstances (R. 74–75). The President indicated his approval of these proclamations in a letter to the Secretary of War (R. 75–76).

Pursuant to the Proclamations of February 8, 1943, General Emmons issued a revised set of General Orders Nos. 1 to 14, effective March 10, 1943, and rescinded General Orders Nos. 1 to 181, issued under the prior proclamations (R. 97–224, 226). General Orders No. 2 (R. 98–118) vested provost courts and military commissions with jurisdiction to try any case or proceeding involving violations by a civilian "of the rules, regulations, proclamations, or Orders of the Military or Naval authorities, or of the Military Governor of the Territory of Hawaii, or of the laws of

war," and to impose punishment by fine, imprisonment, or both (R. 99–100, 47–49, 98, 118). Lesser offenses were to be tried by provost courts (R. 101), which in adjudging sentences were to be guided, but not bound, by the penalties provided by the Courts-Martial Manual, the laws of the United States, the laws of the Territory of Hawaii, and the customs of law in like cases (R. 101). The maximum punishment for violation of General Orders not containing a different provision as to punishment, and the maximum punishment which a provost court could impose, was confinement with or without hard labor for a period not to exceed five years, or a fine not to exceed five thousand dollars, or both (R. 101, 104). Provost courts were authorized to admit to bail persons charged with offenses punishable by such courts (R. 104), and their procedure was to follow, so far as feasible, the procedure used in summary courts-martial (R. 105).

Termination of Martial Law.—The District Court on April 20, 1944, sustained the writ, and discharged the petitioner from custody on his own recognizance pending appeal (R. 402–403). Prior to entry of the decree of the court below on November 1, 1944 (R. 1232), reversing the judgment of the District Court, the President on October 19, 1944, issued Proclamation No. 2627 (App., p. 83), providing that, effective October 24, 1944, the privilege of the writ was restored and martial law terminated and directing the Governor of

Hawaii to issue a proclamation accordingly.[1] The Governor issued such a proclamation (App., p. 85).

2. Petitioner's provost court trial

A penal summons from the Military Governor to the petitioner, dated and served on February 29, 1944, commanded him to appear at the provost court at Pearl Harbor on March 1, to answer the charge of violating paragraph 8.01 of General Orders No. 2, which provided that no person should commit an assault on any military or naval personnel with intent to resist or hinder them in the discharge of their duty (R. 365–366). When the petitioner appeared in obedience to the summons, he was asked whether he desired counsel and whether he was ready to proceed with the trial; he stated that he did not desire counsel and was ready to proceed (R. 784). The trial was adjourned until March 2 because of the absence of the Government's witnesses (R. 785).

At the trial Corp. Robert Bowerman, United States Marine Corps Reserve, and Pvt. James C. Hunter, United States Marine Corps Reserve,

[1] In Executive Order No. 9489 (9 F. R. 12831), dated October 18 and effective October 24, 1944, the President also directed the Secretary of War to designate the Commanding General, United States Army Forces, Pacific Ocean Areas, which included the Territory of Hawaii, as a military commander within the meaning of the Act of March 21, 1942 (18 U. S. C. Supp. III 97a) with authority to designate the Territory or any part thereof as a military area and to prescribe regulations on such matters as blackout and curfew periods, air raid precautions, exclusion of individuals from the Territory, and possession of weapons.

testified to the petitioner's assault upon them on February 24, 1944, while they were on duty guarding the main gate of the Pearl Harbor Navy Yard (R. 367–377). The petitioner then testified on his own behalf (R. 378–379). On March 2 the court found the charges sustained by the evidence, adjudged the petitioner guilty, sentenced him to six months' confinement, and committed him to the custody of the respondent, Sheriff of the City and County of Honolulu, for execution of the sentence (R. 379–381).

3. The habeas corpus proceeding

The Pleadings.—On March 14, 1944, the petition for a writ of habeas corpus was filed in the United States District Court for the Territory of Hawaii alleging that the petitioner's trial and conviction by a provost court and his imprisonment were unlawful and unconstitutional in that there existed no real or apparent threat of invasion of Hawaii, that martial law did not lawfully exist within the Territory, and that irrespective of martial law there was no military necessity for the trial of the petitioner, a civilian, by a military tribunal (R. 4–8).

The respondent's return and answer to an order to show cause why a writ should not issue (R. 2, 25–38) admitted that the federal and territorial criminal and civil courts were functioning (R. 7, 27–28), but denied that the petitioner's trial and imprisonment were unlawful and unconstitutional

or that imminent danger of invasion had ceased or that martial law did not lawfully exist (R. 26–29). The return affirmatively alleged that under the proclamations of the Governor and Military Governor, issued on February 8, 1943, the suspension of the privilege of the writ and martial law continued and the civil courts were without jurisdiction to try violations of military orders (R. 70–74). The return further alleged, on belief and on information from the military authorities, that Hawaii had at all times since December 7, 1941, been in imminent danger of attack and that the public safety required the continued existence of martial law and suspension of the privilege of the writ (R. 43–44), that the provost courts were necessary and proper for the successful prosecution of the war (R. 47) and were established in good faith and in the honest belief that military necessity required them, and that the punishment in a provost court of persons assaulting military sentries in the performance of their duties with intent to obstruct them was not unreasonable or arbitrary (R. 54).

The petitioner's traverse, filed on April 4, 1944, denied the military necessity for the petitioner's trial by a provost court and the existence of any imminent danger of invasion, within the meaning of Section 67 of the Hawaiian Organic Act, at the time of the alleged offense and of the provost court trial (R. 384). Upon the argument on March 31, 1944, the District Court determined that

a writ should issue, returnable immediately. The respondent produced the petitioner in court. Thereupon the court ordered that the petitioner be released pending determination of the case on furnishing a bond of $500.00 (R. 415). It was stipulated that the return to the order to show cause and the traverse to this return should stand as a return to the writ and as a traverse to the return to the writ (R. 484–485).

The evidence produced at the hearing before the District Court on the issues raised by the petitioner may be conveniently divided into two parts, that relating to the question of imminent danger of invasion and the necessity for martial law, and that relating to the petitioner's assault on the Marine sentries and the provost court trial.

The Evidence as to the Military Situation.— The evidence bearing on the military necessity for martial law and on the question of imminent danger of invasion consisted principally of the testimony of Admiral Chester W. Nimitz, Commander in Chief of the Pacific Fleet and of the Pacific Ocean Areas, Lt. Gen. Robert C. Richardson, Jr., United States Army, then Commanding General of the Central Pacific Area, and Governor Ingram M. Stainback.

Admiral Nimitz testified that the Hawaiian area constituted the only base for the Navy in the Pacific Ocean at that time, and that despite daily

searches a Japanese surprise carrier attack on the Hawaiian Islands was within the enemy's capabilities (R. 1073–1076). He testified that while invasion by seaborne troops in sufficient number to seize a beachhead was not probable, invasion by submarine, commando raiders and espionage parties was imminent and constantly impending, as well as invasion by carrier-borne aircraft (R. 1078).

General Richardson testified that the Hawaiian Islands are within the theatre of operations of the Pacific Ocean Areas, which is an active theatre of war (R. 1011), and that the Islands constitute the apex of a bastion, composed also of Alaska and the Panama Canal, upon which the safety of the West Coast of the continental United States depends (R. 1011–1012). He reviewed the Japanese military actions which had taken place in the Territory from the beginning of the war (R. 1013–1015). He testified that the Japanese fleet was still capable of making a surprise attack upon Oahu by the use of air or undersea craft, and that the danger of this type of invasion was always impending and imminent even though the Japanese might not be capable of landing a large land-based force for the purpose of seizing the Islands (R. 1030–1031). He testified that Pearl Harbor is the most attractive target for the Japanese enemy because it is the base of the Pacific Fleet, and that it was likely that Japan would take the risk of launching an attack be-

cause of the attractiveness of the target and the considerable damage which might be inflicted (R. 1016–1018, 1031–1042). He stated that the Japanese fleet had the capability of launching an attack on Oahu and there was danger of such a surprise attack because it was impossible to patrol the whole surface of an area as large as the Pacific Ocean and because a Japanese carrier force could move close to Oahu without detection under cover of a "cold front", a large zone of mist which is a very common weather phenomenon in the area (R. 1049).

Besides the possibility of striking from carriers, the Japanese could make use of submarines by which they could approach at night, launch boats, and send parties ashore in order to secure information of great military value or to attack important installations (R. 1019–1021). In this connection General Richardson pointed out that the probability of such attacks and their success was increased by the presence of disloyal individuals among the population of the Islands. He stated that although the persons of Japanese ancestry comprising one-third of the total population of 400,000 were, for the most part, entirely loyal, it was believed that there were some potentially disloyal individuals among them. Some of the disloyal individuals, aliens and citizens alike, had been detected and interned. It was apprehended that undetected disloyal persons would assist the enemy if an opportunity was presented,

by supplying military information and in other ways. (R. 1020–1025.)

General Richardson emphasized in his testimony the fact that the successes of our fleet had not removed the imminent danger of invasion but, on the contrary, had increased it because these success made it more imperative for the enemy to repeat its former successful invasion of the base, so necessary for the successful operation of the fleet (R. 1025–1026).

On the question of the military necessity for provost courts, General Richardson testified that the discharge of his responsibility for military security required a method of enforcement of military security regulations which was prompt and subject to his immediate control and authority, and that under martial law the provost courts provided such a method of enforcement. Speedy trial and punishment were deemed important in the enforcement of martial law. (R. 1026–1030.) He testified that in carrying out his responsibilities for military security he should not be required to rely upon other agencies for the enforcement of his security measures (R. 1052), and that the failure of the civil courts to deal adequately with violations of military security orders deemed necessary by the military commander would diminish his authority and his ability to discharge his military responsibilities (R. 1057). He testified that a military trial for the offense involved here was necessary in order

to uphold the authority of military sentries who were charged with important military duties (R. 1050–1051). In this case the sentries were on duty at the main gate of the Pearl Harbor Navy Yard checking and preventing disturbances at a busy period of the evening (R. 779, 798–799, 898–899).

On cross-examination General Richardson brought out that he had considered very carefully the abolition of the provost courts but finally concluded that offenses against military orders, such as the order here involved, which was considered essential to security and the substance of which was not embraced within the civil laws relating to assault and battery, should be triable by the provost courts in order to give effect to his military responsibility (R. 1065).

Governor Stainback testified that in his opinion public safety did not require the suspension of the privilege of the writ of habeas corpus and that there was no imminent danger of invasion (R. 826) and no military necessity for the trial of civilians in provost courts for offenses other than crimes against the laws of war (R. 825–828, 898–899). Judge Albert M. Cristy of the Circuit Court of the Territory testified that he did not believe that any reason existed except military orders for the failure of the civil courts to resume the conduct of their business within a few weeks after the Pearl Harbor attack (R. 603–608).

The Provost Court Trial.—The petitioner testified that he did not assault the two marine sentries.[2] The testimony of the sentries, however, was that the offense had been committed (R. 802–901). The petitioner challenged (R. 530) the correctness of the transcript of the testimony in the provost court, annexed to the return (R. 367–379), in his testimony in support of the allegation of the petition that he was tried upon a false charge in a provost court and was tried without counsel (R. 5–6). The accuracy of the transcript was established by the testimony of the court stenographer (R. 782–798), the provost court judge (R. 942), and Corp. Bowerman and Pvt. Hunter (R. 801, 899).

Captain J. Frank Wickhem, who served as Provost Court Commissioner for the Territory of Hawaii, in his testimony explained the procedure in the provost court. After a citation by the shore patrol, the military police, or the civil police, directed to the defendant, he was requested or

[2] The Government objected to the petitioner's testimony on the question whether the assault in fact occurred, on the basis of the clearly established rule that the only question in habeas corpus proceedings is whether the military tribunal had jurisdiction over the offense charged (R. 507–516). The petitioner argued, however, that the evidence would show that he had not in fact violated the General Orders and therefore the provost court lacked jurisdiction (R. 507–508). Thereupon the District Court overruled the Government's objection and allowed the testimony; the Government introduced evidence as to the offense because it was unwilling to permit the petitioner's testimony that he had been falsely accused and unfairly tried in the provost court to go unchallenged on the record.

summoned to appear at the civil police station within 48 hours for booking; the charge was drawn, signed and verified; the defendant was then brought into court, arraigned, and informed that he had the right to counsel and to call or subpoena witnesses; and the trial then commenced if the defendant stated he was ready. The trial was conducted according to the rules of evidence; the judgments were reviewed by officers on the staff of the Commanding General who could reduce any sentence or remit the fine (R. 910–912). The provost court judges were qualified attorneys, some of whom had had experience as judges in civil courts (R. 996–1001).[3]

The Rulings Below.—The District Court held that the Governor's proclamation of February 8, 1943, terminated the suspension of the privilege of the writ of habeas corpus (R. 395), relying on its earlier unreported decisions in *Ex parte Glockner* and *Ex parte Siefert*.[4] It held that the Con-

[3] The petitioner's trial in the provost court was before Lt. Commander Arthur L. Mundo, a member of the bar of California as well as of this Court, who served from 1932 to 1942 as a judge of the Superior Court of the State of California, until he was recalled to active duty in the Navy (R. 940–941).

[4] These cases were dismissed by the District Court as moot because the petitioners, naturalized United States citizens of German ancestry interned as dangerous, were removed to the West Coast of continental United States and released. A petition for a writ of certiorari to review a decision (132 F. (2d) 442) upholding the legality of suspension of the privilege of the writ and the internment of another United States citizen as dangerous in Hawaii, was denied by this Court

stitution of the United States and the Hawaiian Organic Act authorize martial law only when conditions of disorder disrupt the orderly conduct of civil government (R. 398); that during 1943 and thereafter the civil government of Hawaii was fully capable of efficient operation; that although on March 2, 1944, and thereafter the Island of Oahu may have been subject to attack, it was not subject to imminent danger of invasion by hostile forces; and that martial law did not therefore lawfully exist and the provost court possessed no authority to try the petitioner (R. 401–402).

The Circuit Court of Appeals for the Ninth Circuit, in an opinion by Judge Healy, held that the military authorities were authorized to prescribe offenses interfering with military security and to make violations triable in military tribunals, and that the petitioner's imprisonment was therefore lawful (R. 1207–1208). In view of this conclusion as to the legality of the imprisonment, Judges Healy and Garrecht found it unnecessary to decide whether the emergency existing in the Territory as of the time of the filing of the petition was such as to warrant the then suspension of the writ (R. 1192). Judge Wilbur, in a concurring opinion in which Judge Matthews joined, also stated that the suspension of the privilege of the writ was lawful, and furnished an additional ground for reversal of the District Court's order (R. 1209). In a

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on the ground that release of the petitioner on the mainland made the case moot. *Zimmerman* v. *Walker*, 319 U. S. 744.

separate opinion Judge Denman held that the petition should be dismissed because on its face it failed to show facts warranting issuance of a writ (R. 1224).

SUMMARY OF ARGUMENT

The scope of martial law authorized by Section 67 of the Organic Act of Hawaii includes trial of petitioner's offense in a provost court. The Constitution of the Republic of Hawaii, which contained the provision for martial law adopted by Congress in Section 67, was authoritatively construed by the Supreme Court of the Republics to authorize the military authorities under a declared state of martial law to take all actions deemed necessary or appropriate to meet the emergency, including military trials, and the action taken is subject to judicial review only for an abuse of discretion. Other common law authorities support this view that in the absence of constitutional limitations military action under an authorized and declared state of martial law is subject to judicial review only for an abuse of discretion. In adopting the language of the Constitution of the Republic of Hawaii Congress authorized martial law to this extent. The facts amply prove that there was no abuse of discretion in providing for the trial of petitioner's offense in the provost court in such a crucial strategic military area as the Territory of Hawaii.

The Constitution, as extended to Hawaii by the general provision of Section 5 of the Organic

Act, does not limit or restrict the scope of martial law specifically authorized by Section 67. The Constitution extends to a Territory only to the degree that Congress extends it. There is nothing in the doctrine of incorporated territories which prevents Congress, in incorporating a territory and extending the Constitution to it, from qualifying that incorporation and extension so that martial law in such a territory will not be subject to the same constitutional restrictions as martial law in a State.

Even if the Constitution applies fully to Hawaii, the exercise of the federal powers here involved was required by military necessity and therefore was constitutional. The courts will not substitute their judgment for that of the war-making branches of the Government on the question of the steps which are necessary in the prosecution of the war. Since it cannot be said that it was unreasonable for the military authorities to conclude that trial of petitioner's offense in a provost court was required by military security, such a trial was constitutional and is not prohibited by the Fifth or Sixth Amendments.

ARGUMENT

The question on which all of the judges of the court below were in agreement was that the provost court had jurisdiction to try the offense with which the petitioner was charged. If this Court affirms on that ground there will be no occasion

to consider any question as to the legality of the suspension of the privilege of habeas corpus. *Ex parte Quirin*, 317 U. S. 1, 25. If, however, the Court concludes that the military tribunal lacked jurisdiction and that the petitioner is therefore unlawfully held in custody, there will no longer be any reason why the petitioner should not be released on habeas corpus. As has been stated (*supra*, p. 7), the suspension of the privilege of the writ has been terminated, and the Government would not oppose discharge of the petitioner if he should be found to be entitled to his liberty. The question presented, therefore, is whether the provost court had jurisdiction to try the offense charged.

The petitioner contends (I) that jurisdiction of a martial law tribunal over a civilian for an offense such as that here involved is prohibited by the federal Constitution except in case of some urgent necessity not present here, and (II) that the Hawaiian Organic Act does not limit or modify the application of this constitutional prohibition in the territory and does not authorize trial of the petitioner's offense by a provost court. The Government contends (I) that the Organic Act authorized petitioner's trial by a provost court, and the Constitution, as extended to Hawaii, did not forbid the trial and (II) that the Constitution, if fully applicable to Hawaii, does not prohibit such a trial.

I

The Hawaiian Organic Act authorized petitioner's trial in a provost court

Section 67 of the Hawaiian Organic Act (Appendix, pp. 82–83) provides in part:

> * * * whenever it becomes necessary he [the Governor of Hawaii] may call upon the commanders of the military and naval forces * * * to prevent or suppress lawless violence, invasion, insurrection, or rebellion * * *, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.

The statutory prerequisites for placing the Territory of Hawaii under martial law are "rebellion or invasion, or imminent danger thereof, when the public safety requires it".[5] Section 67 also provides that the Governor may place the Territory under martial law only "until communica-

[5] Section 67 also provides that "whenever it becomes necessary" the Governor may call on the military and naval forces to prevent or suppress violence, insurrection or rebellion. It appears to be immaterial, as a matter of statutory construction, whether this statutory requirement of necessity limits the Governor's authority to place the Territory under martial law, because if the statutory requirement of public safety is satisfied, the more general requirement of necessity is also satisfied.

tion can be had with the President and his decision thereon made known."

Pursuant to the statute Governor Poindexter, on December 7, 1941, issued the proclamation (R. 12–14) placing the Territory under martial law, suspending the privilege of habeas corpus, and stating that invasion had occurred and that the public safety required his action. This proclamation expressly authorized and requested the military commander to exercise the powers of the Governor, judicial officers, and employees of the Territory during the emergency and until removal of the danger of invasion. Pursuant to the statute the Governor telegraphed the President that he had placed the Territory under martial law and had suspended the privilege of the writ of habeas corpus. The President telegraphed his approval of this action under the statute (*supra*, p. 3).

The petitioner does not assert that the attack on Pearl Harbor did not satisfy the statutory requirements and warrant suspension of the writ and placing the Territory under martial law on December 7, 1941, or challenge the continuance of martial law, in respects which are not material here, down to the date of the trial. The first issue is whether Congress, by authorizing martial law, authorized trial of petitioner's offense in a martial law tribunal on March 2, 1944. The petitioner contends that the establishment of martial

law under the statute did not authorize trial of petitioner's offense, which is asserted not to be related in any way to invasion or imminent danger thereof, in a provost court on March 2, 1944. The Government contends (A) that the invocation of martial law under the statute fully authorized such a trial and (B) that the constitution as extended to Hawaii did not prohibit it.

A. THE STATUTORY POWER TO DECLARE MARTIAL LAW EMBRACED AUTHORITY FOR THE MILITARY TRIAL OF PETITIONER'S OFFENSE.

The view that a military trial of petitioner's offense was authorized by Congress is supported both by the meaning given to the statutory language by the Supreme Court of the Republic of Hawaii before the language was adopted by Congress, and by the meaning given to martial law in other decisions and in the general authorities.

1. Plenary power to establish and exercise martial law, as previously authorized by the Hawaiian Constitution, was conferred by Congress.

a. Hawaiian judicial and legislative precedents indicate that martial law was understood to include power to provide for the military trial of an offense of the character here involved. The pertinent language of Section 67 of the Hawaiian Organic Act was taken practically verbatim from Article 31 of the Constitution of 1894 of the Republic of Hawaii which provided that the President might "in case of rebellion or invasion, or imminent danger of rebellion or invasion, when

the public safety requires it, suspend the privilege of the writ of habeas corpus or place the whole or any part of the Republic under martial law." The reasons for changing the language of earlier constitutions[6] to include a reference to "imminent danger of rebellion or invasion" are not revealed but doubtless are to be found in the experience of the residents with rebellion in the Islands.[7] This constitution had no provision for jury trial. Article 6, Section 1, provided that no person shall be subject to punishment for an offense except on conviction "by a tribunal having jurisdiction of the case."[8]

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[6] Article 39 of the Constitution of 1852 of the Kingdom of Hawaii, and Article 37 of the 1864 and 1887 Constitutions provided that the King "in case of invasion or rebellion, can place the whole Kingdom, or any part of it under martial law; * * *". Article 5 of each of these Constitutions provided that the privilege of habeas corpus shall not be suspended "unless by the King, when, in case of rebellion or invasion, the public safety shall require its suspension".

[7] Similar language is noted in Article I, Section 10 of the United States Constitution which provides that "No State shall, without the Consent of Congress, * * * engage in War, unless actually invaded or in such imminent Danger as will not admit of delay." The Act of 1795 authorized the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion * * *". *Martin* v. *Mott*, 12 Wheat. 19, 28.

[8] Article 6 of the 1852 Constitution provided that the right of jury trial, "in all cases in which it has been heretofore used in this Kingdom, shall remain inviolate forever". Article 6 of the 1864 and subsequent Constitutions, however, substituted for this provision the provision quoted from the 1894 Constitution concerning conviction in a court having jurisdiction of the cases.

The legislative history of the bill which became the Hawaiian Organic Act does not discuss Section 67 or indicate why the language of the Hawaiian Constitution of 1894 with respect to imminent danger of invasion was adopted instead of the language of Article I, Section 9, of the United States Constitution relating to suspension of the privilege of the writ in cases of rebellion or invasion.[9] It is worthy of note, however, that the same language was subsequently used in organic legislation affecting Puerto Rico (Apr. 12, 1900, c. 191, § 17, 31 Stat. 81, 48 U. S. C. 771), the Philippine Islands (Aug. 29, 1916, c. 416, § 21, 39 Stat. 552, 48 U. S. C. 1111), and the Virgin Islands (June 22, 1936, c. 699, § 20, 49 Stat. 1812, 48 U. S. C. 1405s). Evidently specific criteria for the establishment of martial law and, we submit, for its exercise in the territories in question are intended by this language. The key to its meaning is given in part in the leading case which arose in Hawaii under Article 31 of the Constitution of 1894.

In the case of *In re Kalanianaole*, 10 Hawaii 29 (1895), the Supreme Court of the Republic of Hawaii dismissed a writ of habeas corpus and upheld the jurisdiction of a military commission to try and convict a citizen of the Republic for the crime of misprision of treason during a period of martial law and suspension of the writ declared under Article 31 of the 1894 Constitution in con-

[9] *Government for the Territory of Hawaii*, H. Rep. No. 305, 56th Cong., 1st Sess.

nection with the rebellion of 1895 which sought to restore the monarchy. During the period of martial law, proclaimed on January 7, 1895, and terminated on March 18, 1895, the petitioner was sentenced to imprisonment for one year by the military commission. After martial law was terminated and habeas corpus restored, he sought his discharge on the ground that the military commission lacked jurisdiction.

The petitioner contended that the military commission lacked jurisdiction to try a civilian for misprision of treason, on the ground that the offense was not one against the laws of war (10 Haw. at 47). The court held that Article 31 of the Constitution expressly granted the President the power to place the Republic under martial law and in such a case "the President is sole judge of the time during which martial law shall continue as well as of the necessity for proclaiming it in the first instance" (10 Haw. 53).[10]

[10] For this view of the complete discretion committed to the President of the Republic by the Constitution the court relied in part upon the views on the complete discretion of the Legislative and Executive in dealing with rebellion or invasion, expressed in *Luther* v. *Borden*, 7 How. 1; *Martin* v. *Mott*, 12 Wheat. 19; and *Ex parte Merryman*, Fed. Cas. No. 9487.

The subsequent decisions of *Sterling* v. *Constantin*, 287 U. S. 378, and *Moyer* v. *Peabody*, 212 U. S. 78, also affirm the conclusiveness of the determination of the Executive that a state of martial law is necessary. The court in the *Sterling* case proceeded to determine that the particular purported exercise of martial law there involved was subject to and

The court then distinguished between the martial law there involved, which was established pursuant to the express grant of constitutional power to the President in Article 31, and an exercise of martial law in the absence of such a direct grant of power. The latter, but not the former, is justified and limited by necessity which is reviewable in the courts.[11] On the question

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prohibited by the Fourteenth Amendment. But, it is contended *infra* that there is no constitutional prohibition applicable in this case.

[11] The court stated (10 Haw. 53–54):

"Thus, as we have seen, where there is an express grant or recognition of power, the person upon whom it is conferred is sole judge of the necessity of exercising it. And it is obvious that by the same reasoning, the President is sole judge of the time during which martial law shall continue as well as of the necessity for proclaiming it in the first instance.

"In thus holding, we do not wish to be understood as of the opinion that the circumstances of this case would not have justified the proclamation of martial law, were there no express constitutional provision authorizing it. On the contrary, the rulings of the United States courts would seem fully to justify such a course, as an incident of general war power, or on the ground of necessity. It is true that in both the State and Federal Courts, opinions have been expressed to the effect that in the absence of a direct grant of power, martial law is justified and therefore limited by necessity, and that while the executive or legislative branch of the government may by force pass upon the question of necessity in the first instance, their judgment is subject to review by the courts afterwards. See, *Ex parte Milligan*, 4 Wall. 2; *In re Kemp*, 16 Wis. 382; *Griffin* v. *Wilcox*, 21 Ind. 370; *Johnson* v. *Jones*, 44 Ill. 142. But, although this view may be correct on general principles, and even valuable as a cautionary or preventive influence, it has, in fact, been of little value in practical application to specific cases. For, in the cases in which such opinions have been expressed, martial

whether the scope of martial law included a military trial of petitioner's offense, the Court stated that military judgment of what is necessary or appropriate in any particular exigency is subject to review by the courts "only in case of abuse of power, in which case the military may be said to be acting outside of its jurisdiction" (10 Haw. 57), and that "acts done under martial law are not reviewable in the courts, but that neither a prior authorization of martial law nor a subsequent ratification by an act of indemnity of the usual form justifies acts of cruelty or inhumanity" (10 Haw. 58). The court further stated that the power to try by military commission is "not confined to cases connected with the war or insurrection" (10 Haw. 59).[12]

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law had not been proclaimed, and the acts in question were attempted to be justified solely on the ground that martial law existed in fact though not proclaimed. In such cases, the courts might well inquire into or take judicial notice of the facts, for there is nothing else to go by, and in those cases they were of the opinion that there was no basis for the claim made. But where there was ground for a reasonable difference of opinion, or rather where the executive or legislative branch of the government has declared or authorized the declaration of martial law, the courts have invariably, so far as we are aware, refused to interfere, whether on the ground that these were questions of a political nature and therefore outside of their jurisdiction, or questions upon which the courts thought the other branches of government more competent under the circumstances to form a correct judgment, or not."

[12] The court relied in part on establishment of provisional courts in parts of the United States during and after the Civil War and cited *Mechanics' etc. Bank* v. *Union Bank*, 22 Wall. 276; *The Grapeshot*, 9 Wall. 129; and 12 Op. Atty. Gen. 183, 199.

In disposing of the contention (10 Haw. 47) that the military commission lacked jurisdiction to try any offense after actual hostilities ceased and while the courts were open, the court held that the state of war continued beyond actual hostilities, martial law continued in force, and the military jurisdiction was in legal contemplation an impediment to the jurisdiction of the courts (10 Haw. 61–62).[13]

Petitioner here contends (Br. 41) that the *Kalanianaole* decision is of no significance in interpreting Section 67 of the Organic Act because a legislative act of the Republic of Hawaii prior to the military trial of Kalanianaole provided for carrying out the sentences of the military commission and thus retroactively authorized the commission (Act 18 of February 8, 1895) and also because subsequent enactments ratified and granted immunity for acts done under martial law (Acts 20 and 24 of March 15, 1895). These legislative enactments, however, do not in any way minimize the authoritative judicial interpretation of the meaning of martial law as authorized in Article 31 of the 1894 Constitution, but, on the contrary, constitute a legislative interpretation of Article 31. Section 1 of Act 20 expressly provided that "all acts * * * done * * * by

[13] The court relied upon the analogy of the provisional courts established after the cessation of hostilities in the Civil War. *Burke* v. *Miltenberger*, 19 Wall. 519. See also the discussion of the open court doctrine *infra*, pp. 64–66.

any officer of the Government, or other person acting under the authority of the President * * * until martial law shall be declared to be no longer in force * * * in the proclamation or furtherance of martial law, or in the suppression of insurrection, or in the establishment of a military tribunal, or in the arrest, imprisonment, deportation, trial, conviction or sentence of any person charged with treason * * * *or with any act or conspiracy dangerous to the peace or to the safety of life or property* * * * are hereby declared to have been done within the constitutional authority of the President and are confirmed."[14] [Emphasis supplied.]

It is also to be noted that Justice Frear, who rendered the unanimous opinion of the court in the *Kalanianaole* case expounding the extent of martial law under Article 31, was one of the five Commissioners appointed by the President to recommend legislation for Hawaii, pursuant to the Joint Resolution of July 7, 1898, for the annexation of Hawaii. Section 69 of the bill recommended by the Commission in its report to the President contains the language which became Section 67 of the Organic Act.[15] Another member of the Commission which recommended enactment

[14] Act 24 uses the same language in granting immunity from suits. *Acts of the Executive and Advisory Councils of the Republic of Hawaii* (1895) reprinted in petitioner's brief, Appendix xi to xiv.

[15] *Report of Hawaiian Commission*, Sen. Doc. No. 16, 55th Cong., 3d Sess., p. 35.

of Section 67 was Sanford B. Dole, President of the Republic of Hawaii, who approved Acts 18, 20 and 24, *supra,* p. 30, and who established the military commission which tried Jonah Kalaniana'ole, and approved the proceedings, findings and sentence with a modification of the sentence. Thus it would appear that this language, proposed by the Commission and adopted by Congress, was intended to bear the interpretation previously placed upon it by the Supreme Court of the Republic of Hawaii and that when Congress adopted the language it adopted the construction previously placed upon it by the Supreme Court and by the Executive and Advisory Councils of the Republic of Hawaii.

This, we submit, is an appropriate case for the application of the familiar rule of statutory construction that legislative adoption of statutory language which has been authoritatively construed indicates the legislative intent to adopt the accepted construction. *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 131–132, *United States* v. *Ryan,* 284 U. S. 167, 175; *Marlin* v. *Lewallen,* 276 U. S. 58, 62; *Interstate Commerce Commission* v. *B. & O. Ry.,* 145 U. S. 263, 284; *Territory* v. *Ota,* 36 Haw. 80, 97–98 (1942). This is also an appropriate case for the application of the rule that the practical construction of a constitutional provision by the legislature should be given great weight by the judiciary. *Inter-Island Steam Nav. Co.* v.

Territory of Hawaii, 96 F. (2d) 412, 417 (C. C. A. 9), affirmed, 305 U. S. 306.

It is evident, we think, that the martial law power conferred by Section 67 of the Organic Act is of the broad scope defined in the *Kalanianaole* decision which rests, in turn, upon English and American authorities. We turn, then, to a review of these authorities with reference to the martial law concept as it exists apart from the limitations contained in the Federal Constitution.

b. In cases not involving constitutional provisions requiring judicial review of the reasonableness of military action, which are discussed *infra*, pp. 57–67, judicial decisions generally support the view expressed in the *Kalanianaole* case that under a state of martial law, declared pursuant to legislative authority, military tribunals have jurisdiction to try civilians not only for treason and other offenses related to belligerency, but also for other penal offenses when executive authorities determine that the military emergency requires such a course. It is true that usually the reported opinions of the civil courts, reviewing military action, are in cases of treason or other offenses indicating aid to, or sympathy with, enemies or rebels. The reasoning of the decisions, however, is that under a proclaimed state of martial law, during a state of war or insurrection, the military authority's decision on measures to be taken, including military trials, will not be disturbed in the absence of abuse of martial law powers.

In modern times in England, as in this country, the martial law power has been viewed as operative both in time of foreign war and during domestic disturbances of sufficient gravity. In habeas corpus proceedings to test the jurisdiction of military tribunals to try and punish civilians for crimes, the rule has been evolved abroad that a court is not bound by the military commander's assertion that a state of war or of sufficient disorder exists, although it will give great weight to his views in making its determination; but if circumstances warranting martial law are found to exist, the courts hold themselves powerless during hostilities to interfere with particular acts of military authorities. *Tilonko* v. *Attorney General of Natal* [1907] A. C. 93, 461; *Ex parte Marais* [1902] A. C. 109; *The King (O'Connell)* v. *Military Governor* [1924] 2 Irish Rep. 104; *The King (Childers)* v. *Adjutant General* [1923] 1 Irish Rep. 5; *The King* v. *Allen,* [1921] 2 Irish Rep. 241; *Krohn* v. *Minister for Defense, South African Rep.* [1915] App. Div. 191; cf. *Wolf Tone's Case,* 27 St. Tr. 613 (1798); Fairman, *The Law of Martial Rule* (1943), pp. 143–145. The modern practice of passing indemnity legislation which is conclusive on the courts explains the absence of any recent authoritative decision on the common law as to the extent of justification necessary for an exercise of martial law. *Phillips* v. *Eyre,* 6 Q. B. 1 (1870); 4 Q. B. 225 (1869); *Queen* v. *Eyre,* 3 Q. B. 487 (1868); Pollock, *The Law of Torts* (12th ed.,

1923), pp. 123–124. Earlier authorities, however, indicate that an official may be held responsible for a gross abuse of discretion in the exercise of martial law powers. *Wright* v. *Fitzgerald,* 27 St. Tr. 759 (1799); *Queen* v. *Eyre, supra* (charge to grand jury by Blackburn, J., reported in Finlason, *Report of the Case of Queen* v. *Eyre,* 1868); *Mostyn* v. *Fabrigas,* 1 Cowp. 161, 98 Eng. Rep. 1021 (1775); Stephen, *History of Criminal Law of England,* vol. I, p. 215 (1883).

American decisions, not involving the scope or exercise of the martial law powers of federal authorities (*Sterling* v. *Constantin, supra*), also lay down the rule that the legislative and executive authorities, not the courts, determine what degree of force a crisis demands and whether martial law is required, but that "if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable". *Luther* v. *Borden, supra* (7 How. at 44–45);[16] cf. *Mitchell*

[16] In *Luther* v. *Borden*, Rhode Island's original royal charter of 1663, retained as its basic law, expressly authorized the duly appointed military commander in time of war to "use and exercise the law martial in such cases only as occasion shall necessarily require" (7 How. 68). An Act of the General Assembly of the State on June 25, 1842, provided that the State "is hereby placed under martial law . . . (7 How. 8). This Court affirmed a judgment of the Circuit Court for the District of Rhode Island for defendant in an action for trespass by one arrested and detained by the state military authorities as a person aiding the Dorr Rebellion.

v. *Harmony*, 13 How. 115. And even where constitutional protection under the Fourteenth Amendment is invoked it has been stated that a Governor is not liable in damages for arrests made under martial law "in good faith and in the honest belief that they are needed in order to head the insurrection off * * *". *Moyer* v. *Peabody*, 212 U. S. 78, 85.

It is submitted, therefore, that under a declared state of martial law authorized by Congress in Hawaii, the establishment of a military tribunal for an offense such as is involved in this case is a valid exercise of military authority where, as here, such a tribunal was established in good faith and no abuse of discretion occurred in the particular case. It is not within the province of a court in a habeas corpus proceeding to go further in reviewing what was done than to determine whether abuse was committed.

2. *The petitioner's provost court trial did not involve an abuse of discretion*

The facts already reviewed with respect to martial law in Hawaii and the provision for a provost court trial of petitioner's offense amply demonstrate that no abuse occurred. It is not charged that personal discrimination was practiced as against the defendant. With respect to the general provision that was made for military trials, it is evident that the most careful consideration was accorded by responsible officials, civil and military, to the handling of the problem.

The initial decision to establish martial law, entirely replacing the civil government, was made by the Governor, the official chargeable with responsibility under the Organic Act, and was confirmed by the President, who reviewed the matter pursuant to the statutory provision (see *supra*, p. 3). The modification of martial law on February 8, 1943, which left offenses such as petitioner's subject to provost court trial, was determined after careful consideration by the Governor, the President, representatives of the responsible departments of the Federal Government, and the military authorities themselves (*supra*, pp. 5–6). The Governor, pursuant to his statutory responsibility, embodied the modification into a public proclamation (R. 70–74).

The fact that the personal judgment of Governor Stainback was that no need existed for a continuance of martial law in February, 1943, or afterward (R. 828) does not militate against the validity of his official action, into which many judgments necessarily entered. His assumption of official responsibility for the result reached is completely effective without reference to his personal views.

In the face of this record, it is impossible to contend that petitioner's trial was the result of arbitrary or capricious official action. The determination to retain martial law, including military trial of offenses such as petitioner's, was made in the presence of a military situation which

continued to threaten danger from the enemy to the Hawaiian Islands, the key base for military and naval operations in the Pacific (see the testimony of Admiral Nimitz and General Richardson, referred to *supra,* at pp. 11–14). It embodied the military judgment of General Richardson, the responsible commander, that provost court trials, to the extent retained, were vital to the military operations for which he was responsible (see, *supra,* pp. 14–15). Under the test of the validity of the exercise of martial law powers, prevailing in Hawaii under the Organic Act, there can be no question that petitioner's trial and sentence were free of abuse. The procedure accorded him was, on the contrary, the product of the most responsible judgment of all of the officials who were charged with the duty of safeguarding the Hawaiian Islands, providing for peace and good order within them during the prosecution of the war with Japan to a successful conclusion.

B. THE CONSTITUTION, AS APPLICABLE TO HAWAII, DID NOT PROHIBIT THE EXERCISE OF MARTIAL LAW HERE INVOLVED

The petitioner argues, notwithstanding the foregoing, that Section 67 of the Organic Act is limited by Section 5; that Section 5 extended the Constitution to the Territory of Hawaii in all particulars (except certain political provisions not here involved); and that the Constitution prohibited the provost court trial of petitioner's

offense even under the state of martial law declared pursuant to the statute. The Government contends that Section 5 of the Organic Act, extending the Constitution to the Territory in general language, was not intended to and did not nullify or limit an exercise of martial law authorized by the subsequent specific provision of Section 67 of the same Act which expressly provided for martial law in case of imminent danger of invasion. Hence the Constitution as extended to the Territory by the Congress did not prohibit a provost court trial of the offense here involved. It is further contended below that even if the Constitution applies to the exercise of martial law in the Territory as it does in the States, petitioner's trial was valid.

1. *Sections 5 and 67 of the Organic Act, read together, are not intended to extend to the Territory any constitutional prohibition against the petitioner's provost court trial*

Section 5 in its relevant part (as amended by Section 1 of the Act of May 27, 1910, c. 258, 36 Stat. 443, which added the phrase "including laws carrying general appropriations") provides as follows:

> That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said territories as elsewhere in the United States * * *

Section 67 provides:

> That the governor * * * may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.

The treatment of an analogous problem of construction in *Hawaii* v. *Mankichi*, 190 U. S. 197, indicates that the intent of Congress is not to be found in the literal meaning of the general words of Section 5. In that case the petitioner in habeas corpus had been charged with manslaughter upon an indictment not found by a grand jury and convicted by the verdict of nine out of twelve jurors (the other three dissenting from the verdict), pursuant to an Hawaiian statute. It was alleged that the petitioner had been denied his constitutional right to indictment by a grand jury and to unanimous verdict for conviction, upon the theory that the Constitution was extended to the Territory by the Newlands Joint Resolution of July 7, 1898 (30 Stat. 750) annexing Hawaii and providing that legislation of the Islands not "contrary to the Constitution of the United States" shall remain in force until Congress shall otherwise determine. The Court reversed the judgment of the United States District Court discharging the petitioner and held that

the literal meaning of the quoted words of the Resolution did not express the intent of Congress which was to permit the criminal procedure prescribed by the Hawaiian statute to continue until enactment of the provisions of the subsequent Organic Act, which in fact included provisions for grand juries and unanimous verdicts in criminal cases. Similarly, as to the present case, it was not the intention of Congress by the general language of Section 5 of the Organic Act to extend to the Islands a constitutional prohibition against any exercise of martial law authorized by the specific provisions of Section 67. If, as contended *supra,* pp. 24–36, Congress in Section 67 authorized the exercise of the martial law power here involved, it did not intend, by the general words of Section 5, to defeat its specific authorization.

This result also follows from the canon of construction that a specific provision in a statute prevails over a general provision in the same statute. *Missouri* v. *Ross,* 299 U. S. 72, 76; *Ponce* v. *Roman Catholic Church,* 210 U. S. 296, 307; *Kepner* v. *United States,* 195 U. S. 100, 125; King, *Legality of Martial Law in Hawaii,* 30 Cal. Law Review 599, 627–631 (1942); Crawford, *Statutory Construction,* 167 (1940); Sutherland, *Statutory Construction,* 5205 (3rd ed.). As is pointed out above (p. 26), Section 67 is specific in providing that the privilege of the writ of habeas

corpus may be suspended and the Territory placed under martial law not only in case of invasion, as is provided in the Constitution with reference to suspension of the writ of habeas corpus (Article I, Section 9, clause 2), but also in case of imminent danger of invasion. Although the Government contends (*infra*, p. 67) that Section 67 in this respect does not go beyond this constitutional provision but, on the contrary, is a valid practical construction of it, we think it is evident that Congress in any event did not in Section 5 intend to extend to the Territory any constitutional restriction on suspension of the writ or on the exercise of martial law which would nullify the specific language of Section 67.

2. *Congress had authority to limit the extension of the Constitution to Hawaii so as to preserve the exercise of the federal powers here in question*

The Constitution generally, and particularly the provisions of Article III, Section 2 and the Sixth and Seventh Amendments, guaranteeing the right to jury trial, did not extend to Hawaii *ex proprio vigore* immediately upon annexation of the Territory in 1898. *Hawaii* v. *Mankichi, supra; Peacock & Co.* v. *Rep. Hawaii,* 12 Haw. Rep. 27; *Rep. Hawaii* v. *Edwards,* 12 Haw. Rep. 55; *Honomu Sugar Co.* v. *Sayewiz,* 12 Haw. Rep. 96; see also *Balzac* v. *Porto Rico,* 258 U. S. 298; *Public Utility Commrs.* v. *Ynchausti & Co.,* 251

U. S. 401, 406; *Ocampo* v. *United States,* 234 U. S. 91, 98.

Although Mr. Justice White stated in a concurring opinion in *Hawaii* v. *Mankichi, supra,* that by the Organic Act "the islands were undoubtedly made a part of the United States in the fullest sense and given a territorial form of government" (190 U. S. at 220),[17] the meaning of this utterance is by no means clear. It did not relate to the decision concerning a conviction which antedated the Organic Act; and as to the specific procedural right to a unanimous jury verdict, involved in the case, Section 53 of the Act, 48 U. S. C. 635 makes explicit provision. Petitioner's argument, based upon the extension of the Fifth, Sixth, and Seventh Amendments to Hawaii (Br. 36), clearly overshoots the mark. Conceding that Section 5 of the Organic Act has the effect of extending the Constitution to Hawaii in many respects, we think it must be read in the light of other provisions which accord protections to the inhabitants of the Islands and that the qualification which Section 67 attaches to Section 5 was within the power of Congress to enact even if a similar enactment would not be constitutional in the continental United States. A review of the consti-

[17] The view that Hawaii is an "incorporated" territory is, of course, generally accepted. *Statehood for Hawaii* (Sen. Doc. No. 151, 75th Cong., 3d Sess., pp. 9, 94–95).

tutional provisions and cases bearing upon the subject will serve to show that Congress upon incorporating a territory may leave the exercise of certain powers within the territory less restricted by constitutional provisions than may be the case in the continental United States.

Article IV, Section 3 of the Constitution grants Congress the "power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; * * *". The nature of this power, bearing out its terms, indicates its plenary character and forbids limitations upon it by implication. In *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 323, the Court stated:

> In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union.

In other words, in respect to its territories abroad the United States Government is vested with all the attributes of sovereignty, as it is in exercising the power over foreign affairs. *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304; *United States* v. *Belmont,* 301 U. S. 324, 331.

The structure of the Constitution and the purposes for which limitations were placed upon the

powers of Congress, disclose concern for protection of personal civil and political rights within the several States, but do not indicate apprehension concerning the grant to the federal government of unrestricted powers in conducting the nation's external affairs and in dealing with other sovereign states. *Burnet* v. *Brooks,* 288 U. S. 378, 400; *Mackenzie* v. *Hare,* 239 U. S. 299, 311.

The proceedings of the Constitutional Convention reveal that the clause which became Section 3 of Article IV was introduced by Gorverneur Morris on August 30, 1787, and was approved without comment, but do not disclose the purpose of the delegates in adopting it. Farrand, *Records of the Federal Convention of 1787,* Vol. 2, p. 466. In 1803, however, following the debates on the purchase of the Louisiana Territory, Mr. Morris stated that his intention in introducing the clause was to give the government the power to govern territories as provinces.[18] It is not contended that constitutional limitations, apart from the specific references to territories contained in

[18] Mr. Morris, in a letter dated December 4, 1803, wrote to Henry W. Livingston (Farrand, *supra,* vol. 3, p. 404) as follows:

"I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit, to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."

them, [19] have no application outside the geographical limits of the several States; but they are not operative in the territorial possessions except as Congress has extended them there. Certain fundamental limitations, springing from the nature of the Government established by the Constitution, may be applicable there of their own force; but these do not include the restrictions upon martial law which are here pertinent. See *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313, *infra*, p. 50.

The decisions on the application of the Constitution to the territories, although expressing a variety of conflicting views, support the position taken here. Such constitutional rights as the right to a jury trial are not guaranteed by the Constitution *ex proprio vigore* in a territory immediately upon its acquisition, but only after and to the extent that Congress extends the pertinent constitutional provisions to the territory. *Rassmussen* v. *United States*, 197 U. S. 516; *Dorr* v. *United States*, 195 U. S. 138; *Hawaii* v. *Mankichi*, *supra*.

[19] Among provisions of the Constitution containing limitations upon governmental authority, only the Thirteenth Amendment prohibiting slavery in any place subject to the jurisdiction of the United States, the Eighteenth Amendment, and the provision of the Twenty-first Amendment governing the transportation or importation of intoxicating liquors into any State, territory, or possession of the United States, mention the territories specifically.

The *Rassmussen* case is the only case in which this Court has based a decision upon the view that legislation had "incorporated" a territory into the United States and thereby extended to it all of the protections contained in the Constitution. The case involved a conviction for the misdemeanor of keeping a bawdy house in Juneau, Alaska, in 1902 in violation of Section 127 of the Act of March 3, 1899, 30 Stat. 1253, 1272, enacting a criminal code for Alaska. The conviction resulted from a verdict of six jurors as provided for the Territory by Section 171 of the Act of June 6, 1900, 31 Stat. 321, 358. The conviction was reversed by this Court on the ground that Section 171 violated the Sixth Amendment, which was held to have been extended to Alaska by the Treaty of March 30, 1867 with Russia (15 Stat. 539), extending the rights of United States citizens to the inhabitants of the Territory and by subsequent legislation indicating the intent of Congress to incorporate the Territory into the United States.

The concurring opinions in the *Rassmussen* case expressly disclaim any reliance on the doctrine of incorporation expressed by Mr. Justice White for a majority of the Court. In lieu of this doctrine the concurring opinion of Mr. Justice Harlan (197 U. S. at 528) relies on the doctrine of extension of the Constitution *ex proprio vigore* to all territory of the United States. The

concurring opinion of Mr. Justice Brown (197 U. S. at 531) relies on the doctrine of irrevocable extension of constitutional provisions to a territory by legislation having such a purpose but holds that as to Alaska the right to jury trial should have been based upon the treaty, which conferred that right without extending the entire Constitution to the Territory. Earlier concurring opinions of Mr. Justice White expressing the incorporation doctrine (*Downes* v. *Bidwell*, 182 U. S. 244, 292; *Hawaii* v. *Mankichi*, 190 U. S. 197, 218–219) were accompanied by dissenting opinions in those cases criticizing the doctrine as indefinite in meaning (Fuller, C. J., 182 U. S. at 372, 190 U. S. at 225; Harlan, J., 182 U. S. at 391, 190 U. S. at 240).

The majority of the Court in the *Rassmussen* case did not suggest that Congress could not originally have qualified the incorporation of Alaska in order to withhold the constitutional right to jury trial from all or from some of the inhabitants. In fact, Article III of the Treaty, quoted in part and relied on in part by the Court (197 U. S. 522), excepted "uncivilized native tribes" from the protections extended to other inhabitants and provided that these tribes should be subject to such laws and regulations as the United States might adopt for them.[20] It was

[20] Article III provides (15 Stat. 539, 542):

"The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to

not involved in the decision or suggested by the Court in the *Rassmussen* case that this qualification upon the extension of constitutional rights to inhabitants of Alaska was invalid.

In *Balzac* v. *Porto Rico*, 258 U. S. 298, however, holding that the Organic Act of Porto Rico of 1917 did not incorporate Porto Rico into the United States and thereby require a jury trial under the Sixth Amendment in a prosecution for criminal libel, the Court,[21] in an opinion by Mr. Chief Justice Taft, expressed the incorporation doctrine without dissent (Mr. Justice Holmes concurring in the result without opinion), and stated that the constitutional provisions for a jury trial in criminal and civil cases apply to the "Territories of the United States" but not "to territory belonging to the United States which has not been incorporated into the Union". Other provisions were said to apply of their own

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Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

[21] Mr. Justice McKenna, who had concurred in the opinion of Mr. Justice White in *Downes* v. *Bidwell*, *supra*, was the only remaining member of the Court which decided the *Insular Cases*.

force.[22] See also *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 674; *Ocampo* v. *United States*, 234 U. S. 91; *Dowdell* v. *United States*, 221 U. S. 325; *Trono* v. *United States*, 199 U. S. 521; *Kepner* v. *United States, supra;* Coudert, *Doctrine of Terri-*

[22] The Court stated (p. 304-305, 312-313):

"It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States. *Webster* v. *Reid*, 11 How. 437, 460; *Reynolds* v. *United States*, 98 U. S. 145, 167; *Callan* v. *Wilson*, 127 U. S. 540, 556; *American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Thompson* v. *Utah*, 170 U. S. 343, 347; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Black* v. *Jackson*, 177 U. S. 349; *Rassmussen* v. *United States*, 197 U. S. 516, 528; *Gurvich* v. *United States*, 198 U. S. 581. But it is just as clearly settled that they do not apply to territory belonging to the United States which has not been incorporated into the Union. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138, 145.

* * * * *

"The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. This has not only been admitted but emphasized by this court in all its authoritative expressions upon the issues arising in the *Insular Cases*, especially in the *Downes* v. *Bidwell* and the *Dorr Cases*. The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements. The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, * * *"

torial Incorporation, 26 Col. L. Rev. 821; Littlefield, *The Insular Cases,* 15 H. L. R. 169; Thayer, *Our New Possessions,* 12 H. L. R. 464; Langdell, *The Status of Our New Territories,* 12 H. L. R. 365.

None of the decisions expounding the doctrine of incorporation, including the *Rassmussen* case, suggests that Congress, in extending the constitutional provisions to a territory to the degree that the territory becomes incorporated into the United States, is without power to qualify the incorporation and the extension of constitutional rights by withholding particular constitutional rights which, in the first place, it is not obliged to extend to a territory. These decisions make clear the cogent reasons for the view that constitutional rights, such as the right to jury trial, are not extended to territories except as Congress extends them. *Balzac* v. *Porto Rico, supra; Ocampo* v. *United States, supra.* These reasons apply equally to support the view advanced by the Government in this case that Congress, in the Organic Act extending the Constitution to Hawaii, which is relied on to establish that Hawaii is an incorporated territory, had plenary power to qualify that extension to provide that neither the Sixth Amendment nor other constitutional provision should operate to make unlawful military trials under martial law authorized by Section 67 of the Organic Act. The *Rasmussen* case, involving a subsequent attempt by Congress to withdraw the

right to a jury trial under the Sixth Amendment which had been granted by prior treaty and legislation to the inhabitants of Alaska, presents an entirely different situation. In the present case, as in *Hawaii* v. *Mankichi, supra,* the specific provisions of Section 67 govern over the general provisions of Section 5 extending the Constitution generally to the Territory of Hawaii.

Moreover, nothing in the language or the arrangement of the text of the Constitution supports any doctrine of a neccesarily unqualified incorporation. The power to regulate the territories is found in Article IV which, by its context and separate location, suggests an independence from the limitations in Section 9 on the powers granted to Congress in Section 8 of Article I. This view is supported by the consideration that although some of the powers granted to Congress in Section 8 are general in their terms, other powers are subject to restrictions, such as the power to collect taxes, duties, imposts and excises which, under Paragraph 1 of the section, must be uniform "throughout the United States". This limitation refers to the States and not to the territories.[23] Similarly, the commerce clause of Section 8 empowers Congress to regulate commerce "with foreign nations, and among the several States, and with the Indian tribes", but no mention is made of territories. Section 9 of Article I also indi-

[23] *Downes* v. *Bidwell*, 182 U. S. 244; Langdell, *The Status of Our New Territories* (1899) 12 H. L. R. 365.

cates to some extent that it is concerned with limitations on the exercise of Congressional power within the States by clauses 1, 4, 5 and 6 referring to States but not to territories.

The Bill of Rights, contained in the first ten amendments, was adopted contemporaneously with the Constitution and, like Article I, was concerned principally with the division of power between the Federal Government and the States and with protection to individuals within the States. Although the Bill of Rights includes general provisions containing no explicit geographical limitations, some provisions support the view that as a whole it was not intended to apply outside the States. The Sixth Amendment provides that the prescribed jury is to be "of the State and district wherein the crime shall have been committed". The Tenth Amendment provides that powers not delegated to the United States nor prohibited to the States are reserved to the States or to the people, and thus suggests that all these amendments were addressed to congressional action within the States. The fact that other rights in the Bill of Rights, such as freedom of speech, assembly and religion, do not contain explicit limitations, does not overcome the clearly-implied limitation of these provisions to actions of the Federal Government in the States rather than in its territorial possessions.

The reasons for the constitutional limitations on Congress in legislating for the States were

not applicable to the different situation involving the territories. On the contrary, there were good reasons why such limitations should not bind Congress in dealing with the unforeseeable problems arising upon the acquisition of practically unknown territories on this continent or abroad by conquest, occupation or negotiation with foreign states. As to such territories and people, the Constitution wisely left the time and the extent of the application of the Constitution to the judgment of Congress based on the varying circumstances which would arise. This method has been vindicated by the century and a half of experience in which Congress has extended the Constitution to the territories as conditions permitted.

From the Ordinance of the Northwest Territory of 1787,[24] which preceded the Constitution, to the Act of June 22, 1936, c. 699, 49 Stat. 1807, 48 U. S. C. 1405, providing a civil government for the Virgin Islands, Congress has uniformly extended to the people of the territories a large measure of political and civil rights. The Ordinance was continued in effect without material change by the Act of August 7, 1789, c. 8, 1 Stat.

[24] The Northwest Ordinance established a representative civil government, insured civil liberties, and provided that "The said territory, and the States which may be formed therein shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation * * *". XXXII Journals of the Continental Congress 334, 341 (1787).

50.[25] Organic acts for other territories have granted them legislative power "not inconsistent with the Constitution and laws of the United States". Rev. Stat. § 1851.[26] Other statutes provided in addition that the "Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect * * * as elsewhere within the United States." Rev. Stat. § 1891.[27] The organic acts for Puerto Rico, the Philippine Islands, and the Virgin Islands provide for representative government and include a bill of rights more detailed than the first ten Amendments to the Constitution. 39 Stat. 951 (1917); 41 Stat. 1096 (1921); 39 Stat. 545 (1916); 49 Stat. 1807 (1936). The treaty with France for the cession of the Louisiana Ter-

[25] Similar provisions were incorporated in the acts establishing governments for the Territory South of the Ohio, 1 Stat. 106, 123 (1790); Mississippi, 1 Stat. 549 (1798); Indiana, 2 Stat. 58 (1800); Michigan, 2 Stat. 309 (1805); Illinois, 2 Stat. 514 (1809); Alabama, 3 Stat. 371 (1817); Wisconsin, 5 Stat. 10 (1836); Iowa, 5 Stat. 235 (1838).

[26] See also Acts for Orleans, 2 Stat. 283 (1804); Louisiana, 2 Stat. 331 (1805); Missouri, 2 Stat. 743 (1812); Arkansas, 3 Stat. 493 (1819); Florida, 3 Stat. 654 (1822); Oregon, 9 Stat. 323 (1848); Minnesota, 9 Stat. 403 (1849); Washington, 10 Stat. 172 (1853); and District of Columbia, 16 Stat. 419 (1871).

[27] See also Acts for New Mexico, 9 Stat. 446 (1850); Utah, 9 Stat. 453 (1850); Nebraska and Kansas, 10 Stat. 277 (1854); Colorado, 12 Stat. 172 (1861); Nevada, 12 Stat. 209 (1861); Dakota, 12 Stat. 239 (1861); Idaho, 12 Stat. 808 (1863); Montana, 13 Stat. 85 (1864); Wyoming, 15 Stat. 178 (1868); Oklahoma, 26 Stat. 81 (1890); Alaska, 37 Stat. 512 (1912); Hawaii, 31 Stat. 141 (1900), 36 Stat. 443 (1910).

ritory, 8 Stat. 200 (1803), provided that "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess".[28] Solicitude for the people of the territories has therefore marked the action of Congress with respect to them throughout our history.

Finally, apart from the propriety or validity of a qualification upon the incorporation of Hawaii into the United States which would exempt peace powers of Congress from constitutional limitations, it is submitted that the qualification of incorporation involved is entirely valid and proper when its scope is limited to preserving untrammeled the exercise of the war power of Congress and the Executive to provide for martial law in time of war in this outlying territory. It is submitted, therefore, that the Constitution does not apply to the Territory of Hawaii in any way which renders invalid the exercise of martial law authorized by Congress and involved in this case.

[28] A similar article was included in the treaty with Spain for the cession of Florida, 8 Stat. 252 (1819), and in the treaty with Russia for the cession of Alaska, 15 Stat. 539 (1867).

II

The Constitution, even if fully applicable to Hawaii, did not prohibit the petitioner's provost court trial

The petitioner contends that his military trial, without a jury, violated the Fifth and Sixth Amendments (Br. 15); the Government contends that even if the Constitution applies fully in Hawaii, contrary to our contention above, pp. 39–56, nevertheless (A) the Constitution empowers Congress to authorize trial of such offenses as the petitioner's when martial law has been declared if the military authorities reasonably deem such a trial necessary, and (B) the determination of the responsible authorities that trial of such offenses in military tribunals was necessary in Hawaii in 1944 is not unreasonable.

A. UNDER MARTIAL LAW DECLARED PURSUANT TO STATUTE THE TRIAL OF OFFENSES IN MILITARY TRIBUNALS IS CONSTITUTIONAL IF THAT COURSE IS REASONABLY DEEMED TO BE NECESSARY BY THE MILITARY AUTHORITIES.

The Constitution does not prohibit the trial of offenses in a military tribunal when martial law has been declared pursuant to statute if the military authorities reasonably deem that such trials are required. The correctness of this view is supported by the origin and nature of the Federal Government's power to impose martial law.

The Constitution does not use the term "mar-

tial law".[29] In time of war martial law is imposed in the exercise of the power to wage war which is expressly conferred by the Constitution on the Congress [30] and on the President.[31]

The power to impose martial law also springs from the inherent power of self-defense and self-preservation possessed by this nation which upon its creation by the Constitution became endowed with all attributes of sovereignty possessed by independent nations generally. *United States* v. *Belmont,* 301 U. S. 324; *United States* v. *Curtiss-Wright Corp.,* 209 U. S. 304. In exercising powers of this character, Congress and the Executive may exercise judgment and discretion of wide scope in determining threatened danger and

[29] The Constitutions of Massachusetts (Constitution of 1780, Part the First, Article XXVIII), New Hampshire (Constitution of 1784, Part the First, Articles 34, 51) and South Carolina (Constitution of 1895, Article I, Section 27) authorized martial law by similar provisions to the effect that no person, except those employed in the armed services, shall be subject to martial law, or to any pains or penalties thereunder, except by authority of the legislature. The Constitution of Maine (Constitutions of 1820 and 1876, Article I, Sections 6, 14), Maryland (Constitution of 1867, Article 32), Tennessee (Constitution of 1834, Article I, Section 25; cf. Constitution of 1870, Article I, Section 25), and Vermont (Constitution of 1793, Chapter I, Article 17) provide that persons other than members of the armed forces shall not be subject to or punishable under martial law. Rhode Island's Constitution of 1842 authorized the exercise of the law martial "in such cases only as occasion shall necessarily require" (Article I, Section 18).

[30] Article I, Section 8, clauses 1, 11.

[31] Article II, Section 2, clause 1.

selecting means to combat it. With respect to the war power, where the exercise of judgment by the branches of the government primarily responsible is required, the courts will not review the wisdom of their action or substitute judicial for legislative and executive judgment. *Hirabayashi* v. *United States,* 320 U. S. 81, 93. Judicial inquiry does not go beyond determining whether all the circumstances afforded a reasonable basis for the action taken, and this is a principle which has been applied to a great variety of measures. *Korematsu* v. *United States,* 323 U. S. 214; *Hirabayashi* v. *United States, supra; Ex parte Quirin,* 317 U. S. 1; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Ex parte Milligan,* 4 Wall. 2; *Selective Draft Law Cases,* 245 U. S. 366; *Prize Cases,* 2 Black 635; *Mitchell* v. *Harmony,* 13 How. 115; *Luther* v. *Borden,* 7 How. 1; *Martin* v. *Mott,* 12 Wheat. 19.

Martial law is a particular form of exercise of the war power, or of related power to guard the public safety, involving certain types of actions by the military authorities such as detention of civilians, *Ex parte Zimmerman,* 132 F. (2d) 442 (C. C. A. 9), certiorari denied, 319 U. S. 744, and trial of civilians in military tribunals in domestic territory for acts contrary to public security or in violation of military orders, as in this case. *Ex parte Milligan, supra; Ex parte Vallandigham,* Fed.

Cas. 16816 (C. C. S. D. Ohio); *In re Kalanianaole, supra.*

This Court has noted that it may be assumed that there are "acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury". *Ex parte Quirin,* 317 U. S. 1, 29. Similarly, where the Constitution applies, a martial law trial of a civilian within the generally recognized scope of martial law conceivably might be prohibited by the Constitution. The American authorities are in agreement, nevertheless, that under the Constitution the validity of the exercise of martial law powers, as of other exercises of the war power, is determined with relation to military necessity. *Sterling* v. *Constantin,* 287 U. S. 378; *Moyer* v. *Peabody,* 212 U. S. 78; *Ex parte Milligan, supra; Luther* v. *Borden, supra; In re Kalanianaole, supra;* 8 Op. Atty. Gen. 365; Fairman, *The Law of Martial Rule,* p. 47 (1943); Wiener, *A Practical Manual of Martial Law,* p. 16 (1940).

Most of the decided cases involving the exercise of punitive powers under martial law in this country involve not war but riots or labor disturbances. The courts have divided on the question whether the facts accompanying such disturbances can warrant the exercise of punitive

martial law. Compare *Ex parte Jones,* 71 W. Va. 567; *State* v. *Brown,* 71 W. Va. 519; *United States* v. *Fischer,* 280 Fed. 208 (D. Neb.); *United States* v. *Wolters,* 268 Fed. 69 (S. D. Tex.), approving trial by military tribunals under such conditions with *In re Gillis,* 49 Mont. 454; *Franks* v. *Smith,* 142 Ky. 232, approving preventive measures under martial law but holding that punitive powers are unconstitutional under such conditions. See also *Ex parte Lavinder,* 88 W. Va. 713; *Constantin* v. *Smith,* 57 F. (2d) 227 (S. D. Tex.), affirmed sub. nom. *Sterling* v. *Constantin,* 287 U. S. 378. In *Sterling* v. *Constantin, supra,* this Court, although it did not conclude that the particular situation justified the exercise of martial law there involved, recognized that generally speaking, the validity of the substitution of executive for customary judicial proceedings during a state of martial law depends upon the necessities of the situation (287 U. S. at 400–402).

Congress has expressly recognized that situations may arise in which military necessity requires the substitution of military for civil tribunals in criminal cases. Section 3 of the Reconstruction Act of March 2, 1867, c. 153, 14 Stat. 428, provided that it shall be the duty of the military officer in a military district in previously rebellious territory to cause to be punished disturbers of the public peace and criminals and to allow local civil tribunals to try the offenders "or, when in his judgment it may be necessary for the

trial of offenders, he shall have power to organize military commissions or tribunals for that purpose; * * *". Criminal cases were tried in military courts under this statute (13 Op. Atty. Gen. 59; 12 Op. Atty. Gen. 182). The validity of these trials was not ruled upon by this Court. *Ex parte Yerger,* 8 Wall. 85; *Ex parte McCardle,* 7 Wall. 506, 6 Wall. 318. It was held, however, that the military authorities had constitutional authority to substitute military for civilian tribunals in civil cases in occupied rebellious domestic territory. *Mechanics' etc. Bank* v. *Union Bank,* 22 Wall. 276; *The Grapeshot,* 9 Wall. 129.[32] It is a valid deduction that the necessities of war may supply a basis for a similar military judgment even in loyal domestic territory in the face of invasion; and the legislative provision in Section 67 of the Hawaiian Organic Act and other organic legislation for outlying territories, authorizing martial law in time of threatened invasion, may well contemplate such a situation.

The provisions for jury trial in Article III, Section 2, of the Constitution and in the Fifth and Sixth Amendments require juries only in cases customarily so tried under the common law and in cases similar to those. The purpose of the constitutional provisions was to preserve but not

[32] These decisions state that the power asserted in such domestic territory is the same as the power of military government asserted in foreign conquered territory. *Leitensdorfer* v. *Webb,* 20 How. 176; *Cross* v. *Harrison,* 16 How. 164.

to enlarge the common law right to jury trials. *District of Columbia* v. *Clawans,* 300 U. S. 617; *District of Columbia* v. *Colts,* 282 U. S. 63; *Schick* v. *United States,* 195 U. S. 65; *Callan* v. *Wilson,* 127 U. S. 540. Recently this doctrine has been discussed and held to produce the result that the jury trial provisions are not applicable to the trial of a violation of the laws of war by a military tribunal even in the absence of martial law. *Ex parte Quirin,* 317 U. S. 1, 29–46. Similarly, the jury trial provisions do not apply to the trial of an offense which necessity requires to be brought before a military tribunal in a situation in which martial law has been established in a combat zone pursuant to an Act of Congress. Jury procedures are unknown to military tribunals. *Ex parte Quirin, supra,* at p. 39.

The Government, in addition to reliance on the constitutional power to declare and wage war, might also rely upon the power to make rules for the government and regulation of the land and naval forces (Article I, Section 8) and assert that this case is one of the "cases arising in the land and naval forces" expressly excepted from the grand jury requirements of the Fifth Amendment. The minority opinion in *Ex parte Milligan* (4 Wall. at p. 138) pointed out that persons attempting to injure the national forces might be subjected by Congress to military trial and punishment in the exercise of the constitutional power to regulate the land and naval forces, although the

minority opinion was not placed on that ground. But even if we assume, without conceding, that the provost court trial here was not a case arising in the land or naval forces when the accused is not a member of or associated with those forces, nevertheless a jury trial is not required in such a case because such provost court trials were never deemed to be within the scope of the constitutional provisions for juries. *Ex parte Quirin, supra,* 317 U. S. at p. 41.

Ex parte Milligan does not negative the validity of these general principles. The Court did state that an invasion must in fact be in progress to supply the military necessity justifying a martial law tribunal to try civilians for offenses; but this statement was dictum, as the four dissenting Justices stated (4 Wall. 136). The Court, moreover, was considering the power of a military commander acting in the absence of a state of martial law authorized by the Congress (4 Wall. 124). The language of the *Milligan* case with reference to the necessity of an actual invasion to justify military criminal tribunals, entirely apart from any other circumstances, is a more rigid test than that otherwise uniformly stated by this Court with reference to the war power. *Hirabayashi* v. *United States, supra;* cf. Hughes, *War Powers Under the Constitution,* Sen. Doc. 105, 65th Cong., 1st Sess., p. 12, 42 American Bar Association Reports (1917) 232, 245–246, 2 Mass. L. Q. 575; Fairman, *The Law of Martial Rule,* 163–167. We submit

that it is unrealistic to regard any single factor as controlling in all of the multitudinous situations which may confront the Government and the armed forces in time of war, calling for the exercise of summary powers.

Petitioner contends (Br. 29) that the lack of any military necessity for petitioner's trial by a military tribunal is indicated by the fact that the civil courts were open. It is true that the fact of open civil courts is one relevant factor for the consideration of the military commander in determining whether military tribunals are necessary for particular offenses, and for the courts in determining under the Constitution whether there is any reasonable basis for the military commander's use of military tribunals. Indeed, this factor may have been most important and an entirely reasonable test of military necessity for military tribunals when the Petition of Right was granted in 1628 and when warfare was restricted practically to the fields in which the armies were engaged. As military necessity changes, however, the test must change. The continued operation of the civil courts hardly supplies an adequate test of the necessity for military tribunals under conditions of modern warfare in which all, or very large parts, of the territories of the contending nations may be in combat zones or imminently threatened with long-range attack even while the civil courts are operating.

The views expressed in the *Milligan* case neces-

sarily had reference to conditions in Indiana in 1864. And it is to be noted that Chief Justice Chase in his separate opinion for four members of the Court said (4 Wall. 2, 140–141):

> We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy [against the draft and in favor of rebellion]. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

Since the Milligan decision it has been uniformly recognized that the fact that the courts are open is only one of many factors relevant to determining the military necessity for military tribunals under the varied war conditions which may arise. *Ex parte Marais, supra; In re Kalanianaole, supra; The King* v. *Allen, supra;* Dodd, *The Case of Marais,* 18 L. Q. Rev. 143, 146–147 (1902); Richards, *Martial Law,* 18 L. Q. Rev. 133, 141–142 (1902); Charles Evans Hughes, *War Powers Un-*

der the Constitution, Sen. Doc. 105, 65th Cong., 1st Sess., p. 12, 42 A. B. A. Rep. 232, 245–246, 2 Mass. L. Q. 575, 587–588; 3 Willoughby, *Constitutional Law,* p. 1602 (2d Ed., 1929); Fairman, *supra,* p. 163; Wiener, *supra,* p. 106.

Furthermore, the Court's statement in the *Milligan* case concerning the need for actual and present invasion to justify military tribunals in the continental United States was not addressed to and does not control or limit possible justification through military necessity in respect of invasion of an outlying territory such as Hawaii. The Congress recognized this distinction by the provision that martial law could be established and the privilege of habeas corpus suspended not only in cases of invasion, to which the words of Article I, Section 9, of the Constitution relate, but also in case of imminent danger of invasion. If, contrary to our contention, this provision was intended to operate within the framework of the Constitution as it applies in the continental United States, Congress was giving a practical construction to the fundamental charter which is entitled to great weight in determining the effect of the constitutional limitation upon the military power to establish military tribunals under a state of martial law. *Ex parte Quirin,* 317 U. S. 1, 41–42; *Downes* v. *Bidwell,* 182 U. S. 244, 249; cf. *Martin* v. *Mott,* 12 Wheat. 19, 29.

B. THE MILITARY COMMANDER'S JUDGMENT THAT MILITARY NECESSITY REQUIRED A MILITARY TRIAL OF THE OFFENSE HERE INVOLVED WAS NOT UNREASONABLE

The reasonableness of the military commander's judgment that military necessity required a martial law tribunal for this class of cases is supported by the historic facts relating to the Pacific war which may be judicially noticed and by the facts stated in the expert military opinions expressed in the record by Admiral Nimitz and General Richardson, the military commander. The facts of military significance occurring at the time of the attack on Pearl Harbor and thereafter not only show a clear basis for the establishment of martial law in the first instance, but afford support to the expert appraisal of the military situation in the Territory by Admiral Nimitz and General Richardson at the time of the provost court trial and the hearing in this habeas corpus proceeding in April, 1944. The devastation wrought by the Japanese attack in December, 1941, necessarily was a major factor influencing the military judgment with respect to the possible effects of another such attack in April, 1944 and the military necessity for the exercise of martial law in this case. This factor was accompanied by others arising in the community.

On December 7, 1941, the forces of Japan carried out at Pearl Harbor the most disastrous military attack that has ever been made against

the United States. Pearl Harbor had become in a few minutes our first war front (R. 1167). During and immediately after this unprecedentedly destructive attack, Japanese military planes obtained reconnaissance photographs of the extensive damage to our military installations. A continuation of this successful invasion, culminating in the landing of large numbers of enemy troops and occupation of the Islands, was anticipated by our military leaders. It is not possible to estimate the extent to which such a successful pursuit of the initial military advantage would have retarded our war effort, but obviously it would have had a crippling effect on Pacific operations. Enemy occupation of the Islands at the very least would have delayed ultimate victory for a long period of time and made it much more costly.

Admiral Nimitz and General Richardson, the military commanders chargeable with responsibility for defense of the Islands in April 1944, when this case arose, were also chargeable with direct knowledge of the destructive effect of a second attack on Pearl Harbor and of the difficulty of completely warding off such an attack. They were required to weigh very heavily in their appraisal of the military situation of 1944, the possible destructive effect and the far reaching consequences of another aerial or other invasion. They were required to appraise the military necessities of the situation in view of

what had actually happened. They knew that some months after the attack on Pearl Harbor, and even after the defeat of a Japanese task force in the Coral Sea and the defeat of another task force at Midway, the Japanese forces had actually succeeded in occupying American territory in the Aleutian Islands.

Admiral Nimitz testified that the Hawaiian area constituted the only base for the Government in the Pacific Ocean and that it had the greatest importance for military operations to the westward (R. 1073). He testified that in spite of daily searches by our forces a Japanese surprise carrier attack, similar to the attack on Pearl Harbor Day, was within the enemy's capabilities (R. 1073, 1078). He testified that invasion by stealth, by submarine commando raids and espionage parties was not only probable, but imminent and constantly impending (R. 1078). Admiral Nimitz's testimony was restricted to the general military situation which was his general responsibility and he did not testify concerning particular security measures adopted in the Islands because the responsibility for the security of the Islands had been delegated by him to General Richardson who had the responsibility to take all necessary measures (R. 1013).

General Richardson testified concerning the importance of the Hawaiian Islands to the safety of our West Coast (R. 1011–1012). He testified concerning the probability that the Japanese

enemy would attempt to repeat its successful attack on Pearl Harbor because of the great importance of this target in all our Pacific operations (R. 1016–1018, 1031–1042). He emphasized the enemy's capability of sending parties ashore from submarines to attack important installations or secure information of great military value about our prospective military operations (R. 1019–1021).

On the question of the military necessity for martial law tribunals to try civilians accused of assaults upon military or naval personnel discharging official duties, particularly military sentries guarding military installations, General Richardson testified that military trial of such offenses directly related to military security and was necessary in order to uphold the authority of military personnel in the discharge of their official duties (R. 1050–1051).[33] He pointed out that any failure of civil courts to convict violators of military security orders of this character would diminish his authority and ability to discharge his military responsibilities (R. 1057). He testified that for the prompt enforcement of such military security regulations, a military commander should not be required to rely upon other agencies of gov-

[33] The military importance of the duties of sentries or sentinels is manifest from the extreme penalty provided for their neglect of duty. Article 86 of the Articles of War (10 U. S. C. 1558), Winthrop, *Military Law & Precedents*, p. 616 (2d Ed. 1920).

ernment (R. 1052) and that speedy trial and punishment, which is a characteristic of martial law, was a very important factor in dealing with violations of military security regulations.

In all the circumstances the fact that the civil courts were open was not an adequate test of military necessity (*supra*, pp. 64–66). Failure of the civil courts to deal adequately with violations of military orders such as the order here involved, could not be risked (R. 1057). These considerations have special weight in relation to the offense here involved, assault by a civilian upon a sentry with intent to hinder him in the performance of his duty. No such offense was defined under the Hawaiian laws.[34] The City of Honolulu, in which the offenses occurred, had both a large military population and a population of civilian war workers far in excess of the normal peace-time population of the City. Large numbers of troops were in training in the Islands for the attacks on the Island approaches to Japan and on the home islands of Japan. In addition many thousands of civilian workers from the mainland were em-

[34] Revised Laws of Hawaii (1935) provide:

Sec. 5651. Battery defined. A battery, or an assault and battery, is the malicious and forcible infliction of a corporal injury on another, without authority or justification by law.

Sec. 5657. On public officer. Whoever shall commit an assault or an assault and battery on any public officer, civil or judicial, with intent to resist, prevent, hinder or obstruct him in the discharge or execution of his duty as such, shall be punished by a fine not exceeding one thousand dollars or by imprisonment not more than one year.

ployed at Pearl Harbor[35] and other naval and military installations. The limited housing and public recreational facilities in the City of Honolulu were inadequate for this military and civilian population. The military commander may well have considered that in such a situation overcrowding and other strains might produce rivalry and even some degree of physical conflict between the civilian and military populations.

Moreover, as General Richardson testified, the area here involved was a combat zone with a heterogeneous population in which in many cases alien affinities and loyalties were to be found (R. 1067). One-third of the civilian population were of the Japanese race and a very large part of the military personnel training in Hawaii to fight the Japanese, or awaiting transportation to combat against the Japanese enemy, were not accustomed to living in such a community as Hawaii. Even in times of peace the potential problems created in Hawaii by racially mixed juries in criminal cases have been recognized although, on the whole, it has been found that members of such mixed juries have not acted on a racial basis. *Law Enforcement in the Territory of Hawaii* (Attorney General Mitchell's Report to the Senate) Sen. Doc. No. 78, 22nd Cong., 1st Sess., pp. x, 22, 116–117, 120 (1932).[36]

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[35] The return to the writ of habeas corpus alleges that an average of over 78,000 persons, civil and military personnel, entered the Pearl Harbor Navy Yard daily (R. 51).

[36] Under the laws of the Republic of Hawaii in civil and

It is submitted that the military commander was entitled to consider all these factors, alongside the factor that the civil courts were open, in determining whether military necessity required the trial of the offense here involved before a military tribunal; and it cannot be said that in all the circumstances his determination was unreasonable.

General Richardson explained in his testimony that he had investigated very carefully the possibility of terminating the provost courts entirely in carrying out the directive of the President that governmental controls gradually be returned to the civil authorities (R. 1065, 1070). He concluded that some military orders considered essential to military security, such as the order here involved for protection of military personnel, which was not enforceable in the territorial courts, should continue to be enforced in the provost courts if his responsibility for military security were to be adequately exercised (R. 1065).[37]

That martial law was exercised only as military necessity was deemed to require, is shown by the fact that the more or less complete military controls imposed immediately upon the attack upon Pearl Harbor were gradually relaxed. Gen-

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criminal cases Hawaiians obtained Hawaiian juries and foreigners had foreign juries; in civil cases involving Hawaiians and foreigners mixed juries were used. H. Rep. No. 305, 56th Cong., 1st Sess., p. 20.

[37] The other General Orders which continued to be enforceable in the provost courts involved blackout regulations (General Orders No. 3, R. 118–140), air raid regulations (Gen-

eral Orders No. 29 of December 16, 1941 (*White* R. 82–85) authorized the civil courts of the Territory, which had closed on December 8, 1941, by order of the Chief Justice of the Supreme Court of the Territory under direction of the Commanding General (*White* R. 81), to reopen for trial of limited classes of cases not requiring juries or the subpoenaing of witnesses; General Orders Nos. 57, 133 and 135 (*White* R. 86–88, Appendix pp. 86–94) restored further functions, including jury trials, to the civil courts although some criminal offenses against the Government or related to the war effort were not, up to that time, restored to the civil courts (Appendix p. 89). Governor Stainback's proclamation effective March 10, 1943, reciting that martial law and suspension of the privilege of the writ remained in effect, provided for the restoration of various enumerated governmental functions to the civil authorities, including the conduct of judicial proceedings except certain proceedings against members of the armed forces and prosecution of violations of military orders (R. 70–74).

In the case of the military order here involved,

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eral Orders No. 4, R. 140–147), civilian security evacuation orders (General Orders No. 5, R. 147–152), alien enemy regulations (General Orders No. 6, R. 152–157), military area regulations (General Orders No. 7, R. 157–178) identification and registration (General Orders No. 8, R. 178–195), communications and photography (General Orders No. 9, R. 195–208), labor regulations (General Orders No. 10, R. 208–214), military property and firearms (General Orders No. 11, R. 214–220) and travel (General Orders No. 12, R. 220–225).

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in the all-important Pacific military base of Hawaii where invasion had actually occurred and constantly threatened, the military commander's control over the civilian population's interference with military and naval personnel in the performance of their official duties may well have been considered essential to complete military preparedness and required by public safety. It is difficult to imagine any conduct, short of wilful aid to the enemy, which could more directly affect the military security of the Islands, then operating under a state of martial law, than interference with military sentries at the vital Pearl Harbor installation with intent to hinder them in the performance of their duties. The safety of the installation, as well as the safety of the entire military and civilian population there, and the success of their war efforts, depended on the unhampered performance of duty by such sentries and other military and naval personnel. In view of these considerations the military commander could reasonably deem it necessary to adopt the measures here involved.

If there was a reasonable basis for the military commander to designate as an offense interference with military personnel in the performance of their duties, there was also such a basis for trying the offense in military courts, especially where, as here, the civil courts pursuant to the proclamations of February 8, 1943, had no jurisdiction of such offenses. The expeditious trial of

persons accused of interfering with military and naval personnel in the performance of their duties might reasonably have been considered necessary to the safety of the Territory, so that the full deterrent effect on the civilian population of the knowledge that defendants would speedily be brought to trial might be secured. (See testimony of General Richardson, R. 1028.) Military procedure, of course, is not subject to the delays which may occur in civil trials. See King, *Legality of Martial Law in Hawaii*, 30 Cal. L. Rev. (1942), 599, 611.

Even in peace time the Executive, in the exercise of the constitutional power to execute the laws, may take measures for the protection of civilian officers in the exercise of their functions even to the extent of killing an individual who attacks a civilian officer in the discharge of his duties. *In re Neagle*, 135 U. S. 1, 67. Surely in time of war the Executive, in the exercise of the authority granted both by the Constitution directly and by Congress, must be allowed a large measure of discretion in devising means for protecting the armed forces stationed in a vital military area in the discharge of their duties. To serve the paramount purpose of preserving the country against foreign enemies, the Executive must at the least be permitted the "range of honest judgment as to the measures to be taken in meeting force with force" which is accorded to a state governor for the more limited purpose of

preserving the peace of the State (*Sterling* v. *Constantin*, 287 U. S. 378, 399). Since the belief that the exercise of martial law here involved was required by military necessity cannot be deemed to have been outside the range of honest judgment, the constitutional test was satisfied.

A determination that the public safety requires the continuance of martial law, undoubtedly valid in its inception, should be overturned with particular hesitation. It is apparent that it would be entirely unrealistic and unworkable for the judiciary to engage in a moment-to-moment reexamination of the question of the requirements of the public safety. An effective and fair system of military control must be worked out with skill and in detail, and it cannot be abandoned or changed with every improvement in the military situation or be easily reinstituted after unfavorable developments.

For the reasons expressed, it is submitted that the military commander's judgment that military necessity required trial of the offense here involved in a provost court in a Territory in which the privilege of habeas corpus remained suspended and in which a state of martial law, declared by the Governor and approved by the President, remained in effect, was not unreasonable. Hence petitioner's trial was a valid exercise of the war power under the Constitution, as it was under the Organic Act of Hawaii.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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DECEMBER, 1945.

APPENDIX

CONSTITUTION OF THE UNITED STATES

Art. I, Sec. 8, Cl. 11–16:

The Congress shall have Power * * * To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Art I, Sec. 9, Cl. 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Art III, Sec. 2, Cl. 3:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Art. IV, Sec. 3, Cl. 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

AMENDMENTS

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

HAWAIIAN ORGANIC ACT

The Act of April 30, 1900, c. 339, 31 Stat. 141, provides in part:

SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: * * *

* * * * *

SEC. 67. The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion,

insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.

PROCLAMATIONS AND ORDERS

PROCLAMATION 2627

Termination of Martial Law in the Territory of Hawaii

By the President of the United States of America

A PROCLAMATION

Whereas the armed forces of the Empire of Japan having attacked and invaded the Territory of Hawaii, and the public safety requiring it, the Governor of the Territory of Hawaii, acting under the authority vested in him by section 67 of the act of April 30, 1900, 31 Stat. 153 (48 U. S. C. 532), did, by proclamation dated December 7, 1941, suspend the privilege of the writ of habeas corpus and did place the said Territory under martial law until communication could be had with the President and his decision thereon made known; and

Whereas communication was had with the President and his decision approving the said action of the Governor of the Territory of Hawaii was

made known to the Governor on December 9, 1941; and

Whereas the public safety no longer requires that the privilege of the writ of habeas corpus remain suspended or that martial law continue in the said Territory:

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of April 30, 1900, do proclaim that the privilege of the writ of habeas corpus is hereby restored and that martial law is hereby terminated in the Territory of Hawaii, and I do hereby direct the Governor of the Territory of Hawaii so to proclaim to the people of the Territory of Hawaii.

This Proclamation shall become effective October 24, 1944.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 18th day of October, in the year of our Lord nineteen hundred and forty-four, and of the Independence of the United States of America the one hundred and sixty-ninth.

By the President:

[SEAL] FRANKLIN D ROOSEVELT

CORDELL HULL,
Secretary of State.

By the Governor of Hawaii

A PROCLAMATION

Whereas the Governor of Hawaii by proclamation of December 7, 1941, in the exercise of his powers under section 67 of the act of April 30, 1900, 31 Stat. 153 (48 U. S. C. 532), suspended the privilege of the writ of habeas corpus and placed the Territory of Hawaii under martial law, which action was approved by the President of the United States of America on December 9, 1941; and

Whereas by proclamation dated October 18, 1944, the President of the United States of America makes known that the public safety no longer requires that the privilege of the writ of habeas corpus remain suspended or that martial law continue in the Territory of Hawaii, and proclaims that the privilege of the writ of habeas corpus is restored and that martial law is terminated in the Territory of Hawaii:

Now, therefore, I, Ingram M. Stainback, Governor of Hawaii, do hereby proclaim to the people of the Territory of Hawaii that the privilege of the writ of habeas corpus is restored and that martial law is terminated throughout the Territory of Hawaii.

Done at Iolani Palace, Honolulu, Territory of Hawaii, this 24th day of October, 1944.

INGRAM M. STAINBACK.

TERRITORY OF HAWAII

OFFICE OF THE MILITARY GOVERNOR

IOLANI PALACE

HONOLULU, T. H., *31 August 1942.*

General Orders No. 133

SECTION I. DECLARATION AND FINDING.

SECTION II. OPERATION OF THE CIVIL COURTS.

SECTION III. FUTURE MODIFICATION OF THIS ORDER.

SECTION I. DECLARATION AND FINDING.—Hawaii constitutes the main Pacific outpost of the United States, and accordingly must be regarded as a fortress to whose defense the entire population of the Islands is committed. Its manpower and its economic resources must be subject to a single ultimate control. Martial law has been declared and the emergency which called it forth still prevails. The privilege of the writ of habeas corpus has been suspended and remains suspended. For all this there is authority in Section 67 of the Organic Act. The measures of military control have from time to time been modified in the light of experience and as changes in conditions have dictated. By General Orders No. 29 of December 16, 1941, the civil courts were reopened, subject to certain restrictions. It is now consistent with the public safety and the national defense that they be permitted more fully to exercise the powers normally exercised by them. They cannot, however, be allowed to interfere with the measures required by military security. It is to be understood that the relaxa-

tion herein specified is intended to return to the courts criminal prosecutions and civil litigation to the extent that war conditions permit. However, this action is experimental in nature and the Military Governor reserves the right further to limit the jurisdiction of the courts or to close them entirely, if that course shall be necessary.

SECTION II. OPERATION OF THE CIVIL COURTS.—In accordance with the above declaration and finding, the civil courts are now authorized to exercise their normal jurisdiction, subject, nevertheless, to the following restrictions and limitations:

1. The privilege of the writ of habeas corpus has been and remains suspended.

2. No criminal proceedings shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor.

3. No civil suit, action or other proceeding shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor for any act done within the scope of such employment.

4. (a) No judgment by default shall be entered against any person who is in the Army, Navy, Marine Corps, or Coast Guard of the United States. No judgment by default shall be entered against any person employed or engaged in any occupation, business, or activity under the supervision or direction of the Military Governor, or otherwise essential to the national defense, until

seven (7) days shall have elapsed after the return day provided in the summons or by the statutes of the Territory of Hawaii. A default judgment hereafter entered shall be set aside upon the mere request of the defendant or his attorney, made either orally or in writing, to the court, or clerk thereof, in which the case was pending at the time of the entry of such judgment, if such request be so made within fifteen days after entry of such default judgment. Leave to appear or answer shall be allowed or extended for a like period of fifteen days after such default judgment shall have been set aside. In the event the defendant, after having been allowed to so appear or answer as aforesaid, shall fail to so appear or answer as aforesaid within said period of fifteen days, the court again may enter or cause to be entered the default of the defendant and enter or order entered judgment by default against such defendant. A defendant shall have no right upon his mere request to have a default judgment set aside a second time in the same case.

(b) The provisions contained in this paragraph shall apply to pending cases as well as to cases hereafter commenced or instituted.

(c) A verbatim copy of the contents of this paragraph shall be attached to the summons and served upon the defendant or defendants in cases hereinafter commenced or instituted.

5. No person referred to in paragraphs 2 and 3 of this section, with respect to whom a certificate or exemption is issued by the Military Governor or under his authority, shall be selected or listed by any jury commission as a trial juror or grand juror and no subpoena issued to require the at-

tendance of any such person in such courts shall be valid. Based upon the requirements for labor in the National Defense, the Military Governor will from time to time prescribe the maximum number of persons who may be summoned or held for jury service.

6. (a) No person, firm, or corporation shall institute, maintain, or prosecute any action, suit or other proceeding in any circuit or district court in the City and County of Honolulu, Territory of Hawaii, to recover the possession of any premises used for housing accommodations as defined in Section 1, Ordinance 941 of the City and County of Honolulu, Territory of Hawaii, without first having obtained an order of the Rent Control Commission of said City and County of Honolulu that said plaintiff or plaintiffs is or are entitled to the possession of said premises, and no such suit, action, or other proceeding shall be instituted, maintained, or prosecuted for the purpose aforesaid in any such said circuit or district court without such order having been first obtained by the said plaintiff or plaintiffs in such suit, action, or other said proceeding.

(b) This section shall be retroactive and shall be deemed to have been in full force and effect as of and after January 27, 1942, and shall be retroactive and applicable to any such action, suit, or proceedings, now pending in said circuit and district courts as well as to those hereafter instituted, maintained, or prosecuted in said circuit and district courts.

(c) Payments of rent shall continue to be made at the dates the rent becomes due on all housing accommodations in accordance with the agreement

or procedure previously effected by the parties thereto. Landlords shall refund any unused portions of rent paid in advance to any tenants who are duly evacuated from the Territory of Hawaii.

7. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued will continue to be triable by Military Commissions or Provost Courts.

8. The Military Governor may waive any restriction or limitation established by the foregoing paragraphs, with respect to any person, case, or matter, or class of persons, cases, or matters.

SECTION III. FUTURE MODIFICATION OF THIS ORDER.—This order shall be subject to modification, or revocation, by the Military Governor whenever in his judgment such action is necessary.

All prior orders inconsistent herewith are hereby revoked.

SECTION IV. EFFECTIVE DATE.—This General Order is effective 12:00 noon, 2 September 1942.

By order of the Military Governor:

(Signed) Thomas H. Green,
THOMAS H. GREEN,
Brigadier General, A. U. S.
Executive.

TERRITORY OF HAWAII

OFFICE OF THE MILITARY GOVERNOR

IOLANI PALACE

HONOLULU, T. H., *4 September 1942.*

General Orders No. 135

Jurisdiction of courts.—1. *Criminal Jurisdiction: General.*—This General Order is issued to define the criminal jurisdiction to be exercised by the Federal and Territorial courts and the courts established by the Military Governor, in accordance with General Orders No. 133, this office, 31 August, 1942.

2. *Jurisdiction of Federal Courts.*—The United States District Court for the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. 10 USCA Section 1393 (Protection of uniform of the Army, Navy, Marine Corps, etc); 18 USCA Sections 1 to 17 inclusive (Offenses against the existence of the Government); 18 USCA Section 76a and 76b (Prohibiting reproduction of official badges, identification cards, and other insignia); 18 USCA Sections 94 to 98 inclusive (Offenses against the operations of the Government, such as enticing desertion from the Army or Navy, etc.); 50 USCA Sections 31 to 36 inclusive (Espionage); 50 USCA Sections 45 to 45d inclusive (Photographing, etc., defensive installations); 50 USCA Sections 101 to 106 inclusive (Wilful destruction, etc., of war or national defense material); Violations of the Selective Train-

ing and Service Act of 1940; and Federal statutes relating to Prostitution;

b. All other Federal Statutes heretofore enacted, although not hereinabove enumerated, and all other Federal Statutes hereafter enacted of the class of criminal offenses herein set forth, or relating to offenses directed against the Government, or violations in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

3. *Jurisdiction of Territorial Courts.*—All courts of the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. Chapter 153, R. L. H. 1935 (Anarchistic Publications and Criminal Syndicalism); Chapter 178, R. L. H. 1935 (Disloyalty and desecration of flag); Chapter 180, R. L. H. 1935 (Disorderly House and Drunkenness); Chapter 199, R. L. H. 1935 (Military organizations); Chapter 205; R. L. H. 1935 (Riots, unlawful assemblies); Chapter 208, R. L. H. 1935 (Secret Associations); Chapter 214, R. L. H. 1935 (Vagrants, Disorderly persons, Loitering); Section 5710, R. L. H. 1935 (Places of Prostitution, etc.); Violations of any law, rule or regulation of the Territory or ordinance of any county or city and county relating to public health; assault or assault and battery on police officers or other law enforcement officers in violation of Section 5657, R. L. H. 1935; Act 123, S. L. H. 1937 (Carrying Deadly Weapons); Act

82, S. L. H. 1941 (Sabotage); Violations of traffic ordinances of any county or city and county relating to drunken driving; Violations of territorial traffic laws or traffic ordinances of any county or city and county during blackout hours as established by the Military Governor or during periods of alert as announced by the Military Governor;

b. All other Territorial statutes, county or city and county ordinances, rules and regulations heretofore enacted, or promulgated although not hereinabove enumerated, and all other Territorial statutes hereafter enacted or promulgated of the class of criminal offenses herein set forth, or relating to offenses directed against the Federal or Territorial Governments, or relating to offenses in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

4. *Jurisdiction Over Persons.*—The Federal and Territorial courts shall not assume criminal jurisdiction over the following persons except when authority to do so is first obtained from the Military Governor:

a. Members of the armed forces of the United States;

b. Persons employed or engaged in any occupation, business, or defense activity under the direction of the Army, Navy or Military Governor where the offense is committed within the scope

of their employment. The determination of the status of such persons, and whether an offense is committed within the scope of employment shall rest with the Military Governor whose decision shall be final.

5. *Jurisdiction of Military Commissions and Provost Courts Retained.*—Military Commissions and Provost Courts shall retain and exercise all jurisdiction and powers heretofore granted them by the Military Governor except as otherwise provided herein.

6. *Determination of Jurisdiction Where Questioned.*—Whenever the jurisdiction of the Federal or Territorial Courts, or Military Commissions, or Provost Courts, to hear and determine any case shall in any manner or for any reason be questioned, then in every such case, the issue of jurisdiction shall be determined by the Military Governor whose decision shall be final; and, notwithstanding any other provision of this or any other order of the Military Governor, the Federal or Territorial Court, or Military Commission or Provost Court, as the case may be, shall take, have and exercise jurisdiction in accordance with such determination and decision.

7. *Special Cases.*—Notwithstanding any provision of this or any other order of the Military Governor to the contrary, the Military Governor may, whenever in his opinion such action be necessary in the public interest, exercise jurisdiction at any time over any crime or offense or person, and direct that the same be tried before a Military Commission or Provost Court.

8. *Future Modification of This Order.*—This order shall be subject to modification or revoca-

tion, by the Military Governor whenever in his judgment such action is necessary.

9. *Effective Date.*—This order shall take effect forthwith. Criminal cases pending before the Provost Courts and Military Commission of the class which is within the jurisdiction herein given to the Federal and Territorial courts and in which no plea has been entered shall be tried and determined by the Federal or Territorial court, as the case may be.

By order of the Military Governor:

(Signed) Thomas H. Green,
THOMAS H. GREEN,
Brigadier General, A. U. S.,
Executive.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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IN THE

Supreme Court of the United States

OCTOBER TERM 1945

LLOYD C. DUNCAN, *Petitioner*, against DUKE PAOA KAHANAMOKU, Sheriff, of the City and County of Honolulu, *Respondent*.	No. 14
HARRY E. WHITE, *Petitioner*, against WM. F. STEER, Colonel, Infantry, United States Army, Provost Marshal, Central Pacific Area, *Respondent*.	No. 15

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION
as *amicus curiae*.

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of the California Bar

EDWIN BORCHARD,
of the Connecticut Bar,

THURMAN ARNOLD,
of the District of Columbia Bar,

PIERCE BUTLER,
of the Minnesota Bar,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

The American Civil Liberties Union is interested in these cases because they present important questions of military control over civilians and of the availability of the writ of habeas corpus. For in each of these cases the military authorities in Hawaii have asserted the right to try civilians in military courts for ordinary crimes. And the Circuit Court of Appeals for the Ninth Circuit has not only approved this assumption of military power but has also approved the ban on the issuance of the writ of habeas corpus imposed by the military. Far-reaching constitutional issues of personal liberty are thus clearly presented.

Trial of civilians by military courts has occurred during several of the wars in which this country has been engaged, but has never been upheld except when expressly authorized by Congress. This occurred only in the Revolutionary War. In the War of 1812 and the Civil War detention and trial of civilians by the military was judicially condemned both because of lack of authorization and because of lack of power even in Congress to authorize such trials except at the seat of war. Since then no attempt has been made to subject civilians to military law until the events in Hawaii which form the basis of the present cases. (We pass, of course, trials of civilians associated with the armed forces pursuant to the Articles of War, or trials in occupied territory.)

It is evident, therefore, that military trials of civilians run counter to the tradition of American life. They can be justified, if at all, only by Congressional authorization or dire necessity. Because we believe that there was here neither authorization nor necessity we are filing this brief.

The Facts

The two cases present a considerable variety of circumstance. White was convicted on August 25, 1942 and sentenced to five years' imprisonment for the alleged offense of embezzlement (R. 7, 15). He challenged the fairness of his trial (R. 6, 7). Duncan was convicted on March 2, 1944 and sentenced to six months' imprisonment for the alleged offense of assault (R. 379-381). In the White case the offense charged had no relation of any kind to the armed forces; in the Duncan case it was charged that the assault was committed on sentries stationed at a naval reservation.

It will be observed that the cases fall into different time periods. The White case raises the question of the right of the military to try ordinary offenses during a period when the civil courts were open for certain pur-

poses, but were forbidden by the military to exercise jurisdiction of criminal cases. But by the time the Duncan case was tried in the military courts the situation had changed. The territorial courts were then functioning completely, with certain reservations to be noted.

The relevant historical facts are these: On December 7, 1941 General Short closed all civil courts and set up military commissions and provost courts with power to try all offenses. At the same time the Governor, with the approval of the President, suspended the writ of habeas corpus and declared martial law. On January 27, 1942 the local courts were authorized "as agents of the Military Governor" to exercise their normal functions, with certain restrictions, which included prohibitions against the trial of criminal cases or the empanelling of grand or petit juries. The situation remained unaltered even when the Battle of Midway, in June, 1942, changed the entire picture of the Pacific War. It was after this that petitioner White was tried.

But no change occurred in the formal situation in Hawaii until February 8, 1943. On that day it was declared that after thirty days the civilian agencies of the territory should resume their functions, with certain exceptions. The military authorities attempted to retain control over criminal prosecutions and certain kinds of civil suits against members of the armed forces, and over criminal prosecutions of all persons for violations of military orders. Only the last of these reservations has any application here. Petitioner Duncan was charged with violation of a military regulation which prohibited an assault upon a member of the armed forces with intent to obstruct him in the performance of his duties. The 1943 proclamation did not purport to lift the suspension of the writ of habeas corpus. That was not done, in so many words, until October, 1944. Since then the writ of habeas corpus has been freely available and the territorial courts function without restriction.

Proceedings in the Courts Below

Both habeas corpus proceedings were tried in the United States District Court of Hawaii. There were full hearings at which high military and naval officers testified. The District Court ruled in each case that the writ of habeas corpus was available to petitioners and that the military courts had no authority to try them, since martial law did not lawfully prevail in the territory and the civil courts were open.

The Circuit Court ruled unanimously that the military courts had jurisdiction. Judges Healy and Garrecht did not consider the availability of the writ of habeas corpus; Judges Wilbur and Mathews expressly ruled that it was not available; Judge Denman objected to any consideration of that issue as unnecessary.

The Circuit Court upheld the validity of White's conviction on the ground that at the time he was tried there was such danger of invasion as to justify martial law. It upheld the denial to the ordinary courts of the right to try criminal cases, primarily on the ground that it would have been impossible to empanel juries because of the large number of citizens of Japanese extraction and also on the ground that summary punishment of all offenders would assist in maintaining general security.

The Circuit Court recognized that these considerations could not apply to Duncan because when he was tried the ordinary courts were functioning. His conviction by a military court was upheld, however, on the ground that he had been charged with an offense against a sentry, thus with a violation of a military order, and that jurisdiction over such offenses might properly be retained by the military because Hawaiian law provided for no special punishment for an assault committed upon a member of the armed forces acting in the line of duty.

Since the institution of these proceedings the writ of habeas corpus has been fully restored in Hawaii. We venture to suggest, therefore, that it is not necessary for this Court to pass on the propriety of the earlier attempts to suspend it. For an affirmance of the Circuit Court decision on that ground alone would merely result in the institution of new proceedings on behalf of both petitioners, proceedings in which, of course, the decision of the Circuit Court on the lawfulness of the convictions would be binding, with need for new applications to this Court for certiorari. No useful purpose would be served by putting petitioners to such trouble, expense and delay. We submit, therefore, that the issue of the propriety of the issuance of the writ has, in effect, become moot and that this Court need concern itself only with the propriety of the military trials.

Summary of Argument

We shall, therefore, present the following points for the consideration of this Court:

1. The military authorities had no power to prevent the civil courts from trying civilians for ordinary offenses (White).

2. After the ordinary courts were functioning the military authorities had no power to reserve to themselves jurisdiction over civilians for violations of military orders except as provided in the Articles of War (Duncan).

3. Petitioner White was denied due process in the military hearing afforded him.

Since the basis for the decision of the Circuit Court was the existence of martial law and supposed military necessity, we shall, before discussing the separate points, consider briefly the general subject of military power over civilians.

I. Concerning military power over civilians.

We start with the proposition that civil authority is paramount in the United States. The Declaration of Independence listed as one of the grievances of the colonies that the King of England had "affected to render the military independent of and superior to the civil power". The first Constitutions of many of the states declared, in varying language, that the military should be subordinated to the civil power: Delaware Article I, §17 (1776); Maryland Art. I, §30 (1776); Massachusetts Part I, §XVII (1780); North Carolina Art. I, §24 (1776); Pennsylvania Art. I, §22 (1776); South Carolina Art. I, §§26, 27 (1778).

That this supremacy should prevail in war as in peace, was illustrated early in our history. In the Revolutionary War itself General Washington never attempted to try civilians by military tribunals except under specific authorization from the Revolutionary Congress (see argument in *Milligan* case by James H. Garfield, later President, 4 Wall. at 50, 51). During the War of 1812 Daniel Webster made an eloquent plea against a proposal to permit the military trial of citizens accused of being spies (Annals of Congress 1813, 1814, Vol. 1, p. 885). The courts of New York denied the right of the military to detain civilians, both in habeas corpus proceedings (*In re Stacy*, 10 Johns. 328) and in actions for damages (*McConnell* v. *Hampton*, 12 Johns. 234; *Smith* v. *Shaw*, 12 Johns. 257). Another interesting case arising out of the War of 1812 is *Johnson* v. *Duncan*, 3 Martins Lou. Rep. O. S. 530, which held that a declaration of martial law by General Andrew Jackson did not have the effect of displacing the ordinary courts.

With this early background in mind we come now to the decisions of this Court. We recognize, of course, the proposition that "the war power of the national government is 'the power to wage war successfully'" (*Hirabayashi* v. *United States*, 320 U. S. 81, 93). On the basis of that doctrine this Court upheld military action which imposed a cur-

few on the West Coast (*Hirabayashi* case, supra) and military orders which required all persons of Japanese ancestry, aliens and citizens alike, to leave their homes (*Korematsu* v. *United States*, 323 U. S. 214). But in each of these cases the action taken by the military had been expressly authorized by Congress and both decisions of this Court rested on that circumstance. It is true that the majority of the Court also upheld the constitutional validity of both these regulations on the ground that they were reasonably related to the war effort, particularly to the prevention of sabotage and espionage. But the Court went no further than to approve the regulations as of the time they were violated, in the spring of 1942.

On the other hand, this Court has repeatedly refused to sanction military or other executive action taken in wartime, although supported by the plea of so-called necessity, when the necessity was not apparent and Congress had not authorized such action. Thus in *Brown* v. *United States*, 8 Cranch. 110, this Court held that the President was without power to seize British-owned property during the War of 1812. In *Mitchell* v. *Harmony*, 13 How. 115, this Court upheld a trial court's charge that private property could be taken by the army under the plea of military necessity only when the danger (in that case that the property might fall into enemy hands) was "immediate and impending and not remote or contingent". (See also *Raymond* v. *Thomas*, 91 U. S. 712, 716). And in *Ex parte Endo*, 323 U. S. 283, this Court held invalid the continued detention of a loyal American citizen of Japanese ancestry.

While military action was not strictly involved in that case the extent of the war power of the executive was. And in measuring that power this Court pointed to the need for preserving the guaranties contained in the Fifth and Sixth Amendments to the Constitution. Finding no congressional warrant for detention the majority of the Court felt it unnecessary to consider the power of both Congress and the President to order such detention.

Although this Court did not, in any of these cases, deal with the extent of constitutional limitations on the war power, there can be little doubt [1] that the Bill of Rights limits that power, as it does every other power of the national government.

It is important to bear in mind that the various restrictions on the power of government contained in the Bill of Rights, having been added to the Constitution as a condition of its approval by many of the states, must be deemed qualifications on the powers granted by the original document. That does not mean, of course, that they have the same meaning under all circumstances. Thus freedom of speech and of religion are preserved in war, as in peace, but the fact of war may result in restrictions on speech not justified in peace. And the due process clause requires fair procedure both in war and in peace, although the fact of war may permit interferences with liberty not proper in peace. So it is with the trial of offenses. Trial by jury is obviously not compatible with trial in a military court. But the fact that the Constitution guarantees trial by jury creates a strong presumption against the validity of military trial of civilians. Thus it is not possible to ignore the Bill of Rights in appraising the war power. This Court must make the proper adjustment between the two. And in making that adjustment it cannot bow to the self-declared law of military necessity.

The precise problem here before the Court, the power to try persons by military tribunals, was first considered by this Court after the Civil War. We pass the various cases which dealt with courts in Confederate territory.[2]

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[1] Despite Justice Frankfurter's suggestion in his concurring opinion in the *Korematsu* case, that a military order "appropriate for conducting war" is ipso facto constitutional. Cf. argument for the United States in the *Milligan* case (4 Wall at 19-21, 102-104), eloquently answered by J. S. Black (id. 78-80).

[2] *The Prize Cases*, 2 Black. 635; *The Grapeshot* v. *Wallerstein*, 9 Wall. 129; *Burke* v. *Miltenberger*, 19 Wall. 519; *New Orleans* v. *New York Mail S.S. Co.*, 20 Wall. 387; *Mechanics and Traders Bank* v. *Union Bank of Louisiana*, 22 Wall. 276; cf. *Leitensdorfer* v. *Webb*, 20 How. 176.

Not only were these only civil cases, but considerations which might even justify the trial of offenders by military courts in enemy or rebel territory in no way apply to such trials in our own territory. For in enemy or rebel territory we are dealing with military government which, of course, supersedes civil government completely. At home there can be no such thing as military government. Military trials are justified only on the theory of martial law. Two problems, therefore, present themselves: Do the facts justify martial law? Do all declarations of martial law justify military trials?

The answers are found in *Ex parte Milligan*, 4 Wall. 2. In that case all the members of the Court held void a military trial because not authorized by Congress. The division among the Justices related to congressional power to set up military tribunals in places where the ordinary courts were functioning, with the majority taking the view that Congress had no such power. Justice Davis expressly rejected the notion, advanced on behalf of the military, that a declaration of martial law *ipso facto* authorized trial by military tribunal. He said (p. 124):

> "If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.
>
> "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence.

> Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish."

Moreover, the majority held that, under the circumstances then existing in Indiana, martial law had not been lawfully declared, saying (p. 127):

> "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. * * * Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

Chief Justice Chase's definition of the different kinds of military jurisdiction, although in the dissenting opinion, should always be kept in mind (pp. 141, 142):

> "There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or intime of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; While the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril,

> by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

The minority disagreed with the majority's statement that Congress had no power to authorize a military trial where the civil courts were functioning because Congress might have declared that trial by military was, nevertheless, essential to national safety under the particular circumstances. It is important to remember that Congress did not so declare with regard to Hawaii during this war, any more than it did with regard to Indiana during the Civil War. And, with regard to the President's power to order military trials without specific congressional approval, Chief Justice Chase said (pp. 139, 140):

> "nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the Legislature."

This Court has had several occasions to review the positions taken in the *Milligan* case. In *Sterling* v. *Constantin*, 287 U. S. 378, Chief Justice Hughes quoted with approval the statement of Justice Davis we have given, (p. 9 *supra*). In *Ex parte Quirin*, 317 U. S. 1, the *Milligan* case was pressed upon the Court as authority against the military trial of members of enemy armed forces landed in this country by submarine for the purpose of causing sabotage. The Court held the earlier case inapplicable because Milligan had never been subject to the law of war, but this Court cast no doubt on the continued vitality of the earlier decision.

The case of *Moyer* v. *Peabody*, 212 U. S. 78, is sometimes cited as though it had a bearing on the question of military

tribunals. (It was cited by Judge Wilbur in the *White* case.) But it dealt only with detention, not punishment. While the opinion in that case contains language indicating that the courts will not look behind a declaration of martial law, the force of that language has been much weakened by the *Sterling* case. There the Court pointed out that even if a declaration of martial law had been properly made, it by no means followed that all action taken thereunder was free from judicial scrutiny. As Chief Justice Hughes said (287 U. S. 400):

> "It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

In the lower Federal courts there have been a number of cases dealing with military trials. Some of these related to transactions in enemy territory.[3] Others related to violations of the Articles of War or the laws of war.[4] None of these cases is helpful in considering the problem now before the Court because of the totally different circumstances. Somewhat closer perhaps are the cases which arose out of disorders in the states (*United States* v. *Wolters*, 268 Fed. 69; *United States* v. *Fischer*, 280 Fed.

[3] *Ex parte Ortiz*, 100 Fed. 955.

[4] See *United States* v. *McDonald*, 265 Fed. 754; *McCune* v. *Kilpatrick*, 53 F. Supp. 80. But in *Hammond* v. *Squier*, 51 F. Supp. 227, a military trial of a seaman was held improper because at the time of the trial Congress had not made the laws of war applicable to seamen in the situation in which the particular individual there found himself.

208). It is doubtful, however, whether the decisions rendered in these cases have any present validity whatever.[5]

State courts have generally restricted the right of the military to try civilians to situations where actual warfare or civil disorder was in progress. Some of the cases[6] anticipated the view later expressed by this Court in the *Milligan* case. Strong expressions upholding the supremacy of civilian authority are to be found in *In re McDonald*, 49 Mont. 454, and *Ex parte Lavinder*, 88 W. Va. 713.[7]

There is also the case of *In re Kalanianaole*, 10 Haw. 29, relied on by the Circuit Court. That case, however, arose at a time when Hawaii was an independent republic, thus before any of the provisions of the United States Constitution had became applicable to that territory. Moreover, in that case the offense charged had a direct connection with the events which called forth the declaration of martial law.

It should be pointed out also that some of the writers on this subject have recognized a distinction between "preventive" and "punitive" martial law. Thus Professor Glenn in The Army and the Law (1st Ed., 1918) said that punitive martial law was not recognized in the United States outside of the theatre of military operation (pp. 185 ff). Lt. Col. Fairman in The Rule of Martial Law (2d Ed., 1943) recognizes that the right of the military to try persons is not a necessary incident of the calling out of troops (p. 169).

A review of these authorities suggests the following general principles applicable to the cases at bar. The

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[5] Lt. Col. Fairman in The Rule of Martial Law (2nd Ed. 1943) says at page 171 that these decisions may "now be completely disregarded". He approved the view expressed in *In re McDonald*, 49 Mont. 454.

[6] *Griffin* v. *Wilcox*, 21 Ind. 370; *In re Kemp*, 16 Wisc. 359.

[7] This case in effect overrules much that was said in *Nance and Mays* v. *Brown*, 71 W. Va. 319. See also *Johnson* v. *Jones*, 44 Ill. 142; *Ex parte Moore*, 64 N. C. 802; cf. *Franks* v. *Smith*, 142 Ky. 232; *Bishop* v. *Vandercook*, 228 Mich. 299.

right to try civilians in military tribunals exists only when expressly granted by Congress or permitted by the law of war. The law of war permits military trials of civilians in enemy territory, and permits such trials of members of enemy armed forces. It has no application to domestic territory. Martial law does not automatically permit trials by military tribunals. Martial law cannot be declared except when disorder or invasion are immediate and impending; it does not continue any longer than the emergency which called it into being. Military necessity justifies no interference with the liberties of the citizens when not authorized by Congress and, even then, not unless the action proposed has a direct and necessary relation to the conduct of the war. While great weight will be given to legislative declaration of necessity, it is the courts which, in the last analysis, must determine whether or not the emergency justified the action taken. It should be borne in mind, in this connection, that there is a vast difference between acts such as the curfew and evacuation orders which were approved by this Court and the orders setting up military tribunals now under consideration. The first were upheld because the orders had been authorized by Congress and because of their relation to the security of the nation at a moment of crisis. The measures taken were but temporary, and have, in fact, been rescinded. Convictions by military instead of civilian courts are of a different character. They have little, if any, relation to security, their consequences remain after any possible need for the original action has disappeared. In the particular cases now before the Court there was, as we shall demonstrate, no lawful basis for trial by military courts.

The suggestion of the Court below that there might be such a thing as "qualified martial law" has no support in history or law and should be quickly quashed by this Court. To permit such a notion to take root in the law would open the door wide to interference with liberty by the executive. So long as the civil authorities are able to carry on—and the functioning of the courts is the best test of this—the

role of the military is merely to assist the civil authorities in the performance of their duties. The mere fact that the executive may consider that there are defects in the civil law cannot justify invoking military authority. Particularly should this be so when the military authorities are given power to act both as legislators and judges. The doctrine enunciated by the Court below would have justified General Jackson in his banishment of part of the population from New Orleans after the retreat of the British, thus running counter to all our traditional view of the proper function of military authority. This matter is important not only in relation to acts of the Army in time of war, but also in relation to acts of the militia in relation to threatened internal disorders in time of peace. We submit therefore that the notion of qualified martial law should be repudiated in its entirety.

II. The military authorities had no power to prevent the civil courts from trying civilians for ordinary offenses.

Petitioner White, a stockbroker, was charged with having embezzled the funds of a customer; the offense occurred in 1942 at a time when the Governor had declared martial law and the military authorities had forbidden the civilian courts from trying criminal cases or empanelling juries. The courts, however, were functioning in other respects. No disorder existed; no war was actually being waged on the islands. Can the military justify this assumption of jurisdiction by closing the courts? Or is not the correct rule that stated by Lt. Col. Fairman, in the Rule of Martial Law (2d Ed., 1943), at page 169, where he said "the ousting of the courts calls for martial rule, not martial rule for the ousting of the courts."

The Circuit Court questioned the claim of petitioners that the courts were "open" on the ground that they were functioning only by permission of the military, as "agents"

of the military governor. That assumption, however, begs the basic question. The validity of military action cannot be tested by the formula adopted by the military but by the facts of the particular situation. And here the fact is that the courts were functioning partially and, but for arbitary military restraint, could have functioned completely. Under the doctrine of the *Milligan* case (4 Wall. 2) it was improper to try civilians in military courts. See also *In re McDonald*, 49 Mont. 454, for an excellent historical review of the limitations on military power.

The only reason advanced in support of the refusal to permit the ordinary courts to try criminal cases relates to the empanelling of juries. Judge Healy intimated that the mere assembling of juries might be an invitation to disorder and that the presence on juries of persons of Japanese ancestry might prevent justice being done. That argument is wholly without validity. If, indeed, there was danger from the gathering of citizens of Japanese descent or their service upon juries, it may be that special regulations concerning them might have been adopted in Hawaii as they were on the West Coast (see *Hirabayashi* v. *United States*, 320 U. S. 81; and *Korematsu* v. *United States*, 323 U. S. 214). Perhaps that might have raised difficulties in the case of a Japanese or a person descended from Japanese, since he might have objected to the exclusion from the jury trying him of members of his own race. But only a person of Japanese ancestry could raise such an issue. Neither of the petitioners here was in that category. Besides, while the inability to get juries might justify prolonged detention without trial of persons thought dangerous, it is no excuse for trial by military tribunal.

III. After the ordinary courts were functioning the military authorities had no power to reserve to themselves jurisdiction over civilians for violations of military orders except as provided in the Articles of War.

Petitioner Duncan was charged in February, 1944, with having assaulted two marine corps sentries on duty at a gate of the naval reservation where he was employed. At that time the territorial courts were functioning in the trial of criminal as well as civil cases. They were no longer acting as so-called agents of the general in command, but as co-ordinate branches of the government. That was recognized by the Circuit Court of Appeals.

The Circuit Court also recognized that the Articles of War do not authorize the military authorities to try civilians for an offense of the kind here involved unless these civilians are "connected" with the armed forces, which it is conceded Duncan was not. The only authority for his prosecution by a military court was a regulation promulgated by General Richardson which prohibited an assault committed on a member of the armed forces with intent to obstruct him in the discharge of his duties. Judge Healy frankly admitted that there was no statutory basis for such a regulation and supported it only as a proper incident of martial law, which the Governor was authorized to declare under §67 of the Organic Act.

In reaching that conclusion, Judge Healy, as we already noted, leaned heavily on the absence from the Hawaiian criminal code of the offense of assaulting a member of the military forces. He noted that, in addition to the ordinary crime of assault (Rev. Laws of Hawaii, 1935, C. 166, §§5651, 5659) there was a crime, punished more severely, for an assault upon an officer with intent to obstruct him in the performance of his duties (id. §5657), but that this statute applied only to assaults on civil or judicial officers, not on military officers. Judge Healy concluded, therefore, that

since the military authorities believed that possibility of an attack on Hawaii continued they could legislate for the protection of military personnel.[8]

That is, indeed, the issue which this Court must determine. Can an army commander present on American soil, for the purpose of protecting it against possible invasion, enact rules for the conduct of civilians and subject them to military punishment in the absence of Congressional authority? The question would seem to answer itself. Never before in our history has such an attempt been sanctioned by the courts. The only judicial authority cited by the Circuit Court was the *Hirabayashi* case, 320 U. S. 81. But that case in no way supports the position taken by the Circuit Court. For Congress had expressly approved the military order there involved, as it has not done here. But, and this is even more important, Hirabayashi was tried in the ordinary courts under all the safeguards guaranteed by the Fifth and Sixth Amendments to the Constitution, not, as here, by a military court without benefit of these guaranties.

Ever since *Ex parte Milligan*, 4 Wall. 2, it has been settled that military tribunals have no jurisdiction over civilians for offenses committed outside the theatre of war in places where the ordinary courts are functioning. Military trial was upheld in *Ex parte Quirin*, 317 U. S. 1, only because the individuals affected were persons in the armed service of the enemy, who, by the Articles of War, or the laws of war were subject to military jurisdiction. The Court there pointed out that in the *Milligan* case a different result had been reached because the offense there charged was of such a character that it was "constitutionally triable only by a jury" (317 U. S. 29).

Nor can the result here reached be supported as an automatic consequence of martial law. That notion was repudiated by all the justices in the *Milligan* case. The

[8] It is curious, however, that the military court gave Duncan a punishment which could have been imposed after conviction for simple assault under §5659.

limited authorization to declare martial law contained in the Organic Law does not change the situation. Moreover, it cannot be the law that martial law can remain in force indefinitely. Here martial law was originally declared in Hawaii on December 7, 1941; and was reaffirmed in February, 1943. These declarations had not been expressly revoked at the time of Duncan's trial in 1944. But the civil government was then functioning in all of its essentials, including the trial of criminal cases. That fact completely destroys the effect of the previous declaration.

After all, martial law is something more than a formality. Its declaration must be justified by the facts. *Sterling* v. *Constantin*, 287 U. S. 378. As was stated in the *Milligan* case (4 Wall. at 127) it can continue only so long as the necessity therefor exists. This Court, in both the *Hirabayashi* and *Korematsu* cases, took pains to indicate that it was upholding the action of the military which had been taken on the West Coast only as of the time the military orders were disobeyed, that is in the spring of 1942, clearly intimating that different conditions might produce a different result. Judged by these standards it is clear beyond the possibility of argument that the situation in February, 1944 did not justify martial law. Indeed, there was no longer any factual basis for its continuance at the time of the February, 1943 proclamation which restored full powers to the civilian agencies of government

Judge Metzger, in the District Court, so held (Duncan R. 397 ff). He stressed the fact that no part of the island of Oahu was, or had for two years been, a battlefield (id. 397) and that the military authorities had not asked Congress to give them the power they claimed was necessary (id. 398). He rejected the notion that because martial law had once been declared with the approval of the President, it must continue until the President withdraws approval (id. 400, 401). These arguments seem unanswerable. They were not in fact answered by the Circuit Court.

Judge Healy said merely that General Richardson and Admiral Nimitz had testified that even as late as March

and April of 1944 there was danger of attack and invasion. Judge Wilbur elaborated this point to the extent of quoting their testimony. It is clear from these quotations that no real invasion was possible, not sufficient to "seize a bridgehead". All that was possible were commando raids or submarine attacks. These, of course, were until the war ended possible against any part of the United States as well. They form no basis for the military trial of civilians, whatever might be the basis for the suspension of the writ of habeas corpus, a question which this Court need not now consider.

Moreover, the mere fact that more than two years had elapsed during which no attempt had been made to get Congress to authorize military trials of any kind shows the absence of any real necessity for such trials. Executive interference with liberty should never be countenanced beyond the period necessary to obtain legislative authorization.

We submit, therefore, that at the time of Duncan's trial the state of martial law previously declared had lost all legal force, that in any event there was no basis for his trial by a military court. If there were reasons for more serious punishment of offenses committed on members of the armed forces than on others the proper body to legislate on this subject was the local legislature or Congress, and not the army.

IV. The military trial afforded petitioner White was lacking in due process.

Petitioner White challenges the constitutional validity of the military trial which was afforded him, even assuming that the military had any right to try him. The District Court did not make any finding on that subject. The Circuit Court of Appeals merely said that there was no basis for any complaint of unfairness.

The Circuit Court did not question the proposition advanced by counsel that military trials must conform to a reasonable standard of fairness and indeed there can be no doubt about the correctness of the proposition.

In *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664, Judge Maris considered this question at some length. He concluded that the due process clause is applicable to military trials as to any other, although he recognized that not all the safeguards surrounding criminal trials were applicable. Nevertheless he concluded that unless a military trial conformed to the essential standards of fairness the conviction could be challenged in a habeas corpus proceeding.

This Court has laid down the same general rule for all administrative agencies. See *Kwock Jan Fat* v. *White*, 253 U. S. 454; *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149; *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177. There is no reason why the rule should not apply to military trials.

White, in his application for writ of habeas corpus, raised serious issues of the fairness of the proceedings of the military tribunal. He claimed that he was obliged to stand trial on a charge of embezzlement without being informed in writing of the nature of the charge against him (R. 6). He made a showing that the transactions involved required study of complicated bookkeeping entries, for which purpose he needed a lawyer, that the lawyer of his choice was ill and, therefore, he desired a continuance (R. 12-13). He was, however, forced to trial within five days after his arrest (R. 7). The District Court made no ruling on the fairness of White's hearing, finding it unnecessary to pass on that issue in view of its holding that the military court had no jurisdiction at all.

Under these circumstances we submit that White did not receive a fair trial since he was effectively prevented from submitting a defense. Moreover, the trial was so conducted that the conviction could probably not be pleaded as a bar to any other prosecution. Not only was there no written charge, but there was no record of the oral charge (R. 25). Due process was not complied with.

Conclusion

It is respectfully submitted that the writs of habeas corpus should have been sustained and the military convictions voided. In no other way can the supremacy of civil power over the military be maintained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 14

LLOYD C. DUNCAN,

Petitioner,

vs.

DUKE P. KAHANAMOKU, SHERIFF, CITY AND COUNTY OF HONOLULU,

Respondent

No. 15

HARRY E. WHITE,

Petitioner,

vs.

WM. F. STEER, COLONEL, INFANTRY, UNITED STATES ARMY, PROVOST MARSHAL, CENTRAL PACIFIC AREA,

Respondent

BRIEF OF C. NILS TAVARES, ATTORNEY GENERAL OF HAWAII, AND THE BAR ASSOCIATION OF HAWAII, AMICI CURIAE, IN SUPPORT OF PETITIONERS.

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Alexander, Brief History of the Hawaiian People, pp. 316-320 16
Birkhimer, Military Government and Martial Law, p. 12 15
Frank, Ex parte Milligan v. The Five Companies: Martial Law in Hawaii, 44 Columbia L. R. 639 16, 26
Glenn, The Army and the Law, p. 185 15
Kuykendall and Gregory, History of Hawaii, pp. 277-282 16
8 Ops. Atty. Gen. 365 15
Report of the Committee on Foreign Relations, Sen. Rep. No. 227, 53d Congress, 2d Sess. 16, 17
Underhill, "Jurisdiction of Military Tribunals in the United States Over Civilians", 12 Calif. L. R., pp. 75-98, 159-178 10
Wiener, A Practical Manual of Martial Law, c. V 15
Winthrop's Military Law and Precedents, 2d ed., pp. 819-820 15

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BRIEF OF C. NILS TAVARES, ATTORNEY GENERAL OF HAWAII, AND THE BAR ASSOCIATION OF HAWAII, AMICI CURIAE, IN SUPPORT OF PETITIONERS.

Opinions Below

A single opinion of the Circuit Court of Appeals for the Ninth Circuit, covering both of the above entitled cases, was rendered November 1, 1944 and is reported in 146 F. (2d) 576. The opinions of the United States District Court for the Territory of Hawaii are not reported but are found in the record of the *Duncan* case at pages 389 to 402 and in the record of the *White* case at pages 57 to 73.

Jurisdiction

These cases are before the court on writs of certiorari granted on February 12, 1945, based on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. sec. 347(a)).

Interest of Amici Curiae in These Cases

The Attorney General of Hawaii has the powers and duties which usually pertain to that office.[1] Under his control and direction offenders against the laws of the Territory are prosecuted by the Public Prosecutor of the City and County of Honolulu and the County Attorneys of the other counties[2] in the name of the Territory.[3] The Territory maintains Oahu Prison for the confinement of convicted felons. There is no federal penitentiary in the Territory.

It is the duty of the Attorney General to see to it that offenders are convicted in accordance with the Constitution and governing laws and not otherwise. At the present time there are confined in Oahu Prison, under orders of commitment from military tribunals, five prisoners, four of whom are noted in the list filed in the *White* case (Nos. 50-53 inclusive of Ex. Q., White R. 481, 484, rec'd at p. 110). These five persons were charged, tried and convicted in military tribunals for the offenses of murder (two prisoners), robbery (one prisoner), manslaughter (one prisoner), and burglary (one prisoner). With the petitioners, they constitute the only persons whose liberty now is involved in the cases before the court. Of the seven, only one, the petitioner Duncan, was committed for violation of

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[1] Section 71, Hawaiian Organic Act (48 U. S. C. A. sec. 537); Chapter 22, Revised Laws of Hawaii 1945.

[2] Sections 1502, 6266, 6271, 6528 and 6615, Revised Laws of Hawaii 1945.

[3] Section 11, Hawaiian Organic Act (48 U. S. C. A. sec. 505).

a military order; Duncan could have been charged under territorial or federal statutes but was not.[3a] White and the five prisoners now in confinement were charged with and convicted of violations of territorial statutes.

In the belief that these seven persons were not lawfully convicted and that only by the decision of this court can they secure their constitutional rights the Attorney General of Hawaii is submitting this brief as amicus curiae.

The Bar Association of Hawaii is an association consisting of substantially all members of the Bar practicing or entitled to practice in the courts, federal and territorial, located in the Territory of Hawaii. The Bar Association has been and is greatly concerned with all matters affecting the jurisdiction and operation of all courts in the Territory. The Bar Association, believing that the opinion of the court below constitutes a denial of constitutional rights, is desirous of dispelling any misunderstanding as to whether the first ten amendments to the Constitution of the United States are applicable to the inhabitants of the Territory as fully as to the inhabitants of the states of the United States. The Bar Association desires to show that a military tribunal is without jurisdiction to try, convict and sentence civilians for alleged offenses, other than against the articles of war or law of war, so long as the civil courts are able to function and discharge their constitutional and statutory powers, and that the protection of the Constitution in this respect is as fully applicable to the inhabitants of this Territory as to those of the states of the United States.

These amici curiae will deal only briefly with the general scope and extent of martial law under the Constitution of the United States. Chief attention will be given to the meaning and effect of Section 67 of the Hawaiian Organic

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[3a] Notes 15 and 16, *infra*.

Act in order to show that by this provision Congress did not intend to, and could not, deprive any person in the Territory of any right enjoyed under the Constitution elsewhere in the United States.

Summary of Argument

1. A military tribunal is without jurisdiction to try a civilian for any offense which is not an offense against the articles of war or the law of war, so long as the courts, federal and territorial, are discharging their constitutional and statutory powers, and no impediment exists to a lawful prosecution in said courts.

2. Section 67 of the Hawaiian Organic Act does not have the effect of depriving the inhabitants of the Territory of Hawaii of their constitutional rights, and in particular it does not permit the jurisdiction of military tribunals to be exercised over civilians in causes in which military tribunals could have no jurisdiction in like circumstances within the states of the United States.

ARGUMENT

I. A military tribunal is without jurisdiction to try a civilian for any offense which is not an offense against the articles of war or the law of war, so long as the courts, federal and territorial, are discharging their constitutional and statutory powers, and no impediment exists to a lawful prosecution in said courts.

By Proclamation No. 2627 of the President [4] martial law was terminated in the Territory of Hawaii and the privilege of the writ of habeas corpus was restored on October 24, 1944. Hence there is not now involved in these cases any question of detention of the petitioners on the ground that

[4] 9 Fed. Reg. 12831.

the military commander in good faith believes that the public safety so demands. The cases present the clear question: Were the petitioners lawfully convicted of offenses against the laws [5] of the Territory of Hawaii or the United States? [6]

When martial law exists and the privilege of the writ of habeas corpus has been suspended, then so long as these conditions lawfully continue persons may be arrested and detained in custody, not by way of punishment but by way of protection of the public safety.[7] This is a very great power and suffices to secure the state against all who might do it harm. Martial law was never intended as a system of government of long continued duration. It has served its purpose when, in time of war, the immediate peril has been met and time has been afforded for the substitution of other measures. If there are offenses not covered by the present articles of war, or by the law of war, which ought to be tried before military tribunals, that argument should be addressed to Congress, which it is presumed will legislate thereon with due regard to the limitations of the Constitution and the safeguarding of the rights of the accused. Pending the enactment of such measures the power to arrest and detain in custody is sufficient, without the power of punishment.

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[5] It is axiomatic that every criminal charge must have a clear legislative basis. *Todd* v. *United States*, 158 U. S. 278; *United States* v. *George*, 228 U. S. 14; *Fasulo* v. *United States*, 272 U. S. 620, 629.

[6] In the Circuit Court of Appeals only two of the five judges squarely rested their reversal of the trial court upon the answer to this question. Judge Wilbur and Judge Matthews wrote an opinion upholding the military commander by virtue of the suspension of the privilege of the writ of habeas corpus, as an additional ground; this suspension no longer exists. The fifth judge was of the opinion that the petitions failed to state grounds for relief.

[7] *Moyer* v. *Peabody*, 212 U. S. 78, 84-85; *Ex parte Milligan*, 71 U. S. 2, 125-126; *Ex parte Zimmerman*, 132 F. (2d) 442, 446; *Ex parte McDonald*, 49 Mont. 454, 143 Pac. 947.

The difference between mere arrest and detention as an emergency measure, and the trial and punishment of civilians by military tribunals as the ultimate disposition of their cases, is fundamental under the Constitution. The below quoted passage from *Ex parte Milligan*[8] takes its place beside the Declaration of Independence in the assurance of American liberty.

> "• • • In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*. *The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law*; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it

[8] 71 U. S. 2, 125-6.

could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so." (Italics added.)

The record shows that the military commander went further than the Constitution allows. He undertook to close the courts and to reopen them only after assuming for himself the entire criminal jurisdiction, trials by jury in the courts being prohibited.[9] This he did in the belief [10] that: (1) the procedure of the civil courts was too slow; (2) command over the means of enforcement of military orders was necessary to the maintenance of his authority and the success of his command; (3) enforcement in the civil courts of military orders would entail review of his judgment by such courts, which in turn would entail subjection of the military commander to "all sorts of influences, political and otherwise"; [11] and (4) the holding of civil trials might interrupt vital work through the attendance as jurors of war workers. It is submitted that such belief did not empower the military commander to create "courts"

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[9] White R. 79-88. However the federal court did not close (White R. 139), although the assumption on December 7, 1941, by General Orders 4 (White R. 79) of military authority to try all offenders purported to strip it of criminal jurisdiction at that time. It should be noted that the White record (pages 79-88) only carries the history of the orders relating to criminal trials in the courts to the dates of White's arrest and trial, August 20-25, 1942. The Duncan record picks up this history with General Orders 2, issued March 16, 1943 (Duncan R. 98-118) pursuant to the proclamations of February 8, 1943 (Duncan R. 14-18, 77-81). Intervening were General Orders No. 133 of August 31, 1942 and General Orders No. 135 of September 4, 1942 (Exhibit V in Duncan case, not printed) whereby, less than a week after White was sent to prison by the provost court, jurisdiction over cases such as White's case was restored to the courts, unless the military commander ruled otherwise in a special case. For the convenience of the court these General Orders are reproduced in the appendix to this brief.

[10] Duncan R. 1026-30, 1051-3, 1056-8, 1065-8; White R. 261-264, 276-9, 281-3, 290-3 (being the same as Duncan R. supra) and also page 53.

[11] Duncan R. 1029, White R. 264.

or "tribunals" to try civilian offenders and mete out punishments.

We have here no question as to the power of the *legislative* branch of the government to provide for the more effective prosecution of the war by making the violation of a military order an offense against the United States,[12] or by providing for an extension of the classes of persons and types of offenses triable before military tribunals.[13] We have here no question of the power of the military commander to arrest persons deemed dangerous to the public safety and detain them until it should be safe to turn them over to the civil authorities for trial,[14] or to compel obedience to his necessary commands for the protection of the public safety, when he cannot look to the

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[12] That power was exercised by Congress and supported by this court in *Hirabayashi* v. *United States*, 320 U. S. 81, which supports a curfew order made under the authority of Executive Order 9066, 7 Fed. Reg. 1407, and the Act of March 21, 1942, 56 Stat. 173, 18 U. S. C. A. sec. 97a. The military commander in Hawaii could have issued his orders under the same authority, but did not choose to do so since that would have involved enforcement in the courts (Duncan R. 1029, White R. 263-4). The refusal of the military commander to follow the Act of Congress continued even though on October 16, 1942, General Emmons, predecessor of General Richardson, designated the Hawaiian Department, including the entire Territory of Hawaii, as a military area within the meaning of Executive Order 9066. This is set forth in Section 3.01 of General Orders 7 of March 10, 1943 (Duncan R. 160-1).

[13] *Ex parte Quirin*, 317 U. S. 1, holds that offenders against the law of war may be tried before a military tribunal; *Ex parte Milligan*, 71 U. S. 2, was distinguished as not involving an offense of that character (317 U. S. 1, 28, 45). In the Milligan case, at pp. 139, 142, the four concurring justices suggested that Congress could extend the list of offenses for which trial may be had before a military tribunal to include other offenses "against the security and safety of the national forces", such as the offense of Milligan. Milligan was not charged under the 81st Article of War, the case being governed by the Act of March 3, 1863, 12 Stat. 755. No question of the scope or validity of the 81st Article of War nor the extent to which additional legislation of this character could be passed by Congress is here involved.

[14] *Moyer* v. *Peabody*, *supra*, 84-5.

courts to compel such obedience, through lack of means of subjecting offenders to the jurisdiction of the courts.[15] We have here the sole question as to the power of the military commander to close the courts and then to reopen them subject to limitations upon their jurisdiction so framed as to arrogate to himself part of their jurisdiction.[16] This court twice has held that martial law does not embrace such power within loyal territory.[17] The actual ob-

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[15] The Circuit Court of Appeals assumed that Duncan's case was such a case but it was not, since (1) violations of military orders were punishable in the federal courts under the Act of March 21, 1942; and (2) assaults were punishable in the territorial or federal courts (note 16, *infra*). Hence, Duncan's case, as well as White's case, represents the substitution by the military commander of a new means of punishment for that provided by the duly constituted legislative authority. If a legislative basis for the "offense" were lacking, as supposed by the Circuit Court of Appeals, the order of the military tribunal in no event could be considered a conviction of a "crime", having validity after martial law ceased (note 5, *supra*).

[16] White's offense clearly was within the jurisdiction of the territorial courts. Duncan's offense, viewed as an assault committed on a federal reservation, could have been tried in either the territorial or federal courts having concurrent jurisdiction thereof. *Territory* v. *Carter*, 19 Haw. 198; *United States* v. *Motohara*, 4 U. S. D. C. Haw. 62; Revised Laws of Hawaii 1945, c. 239; 18 U. S. C. A. secs. 451 and 455. Viewed as a violation of a military order, the offense was within the exclusive jurisdiction of the federal court, under the Act of March 21, 1942.

[17] The Milligan case so holds; this is not dictum in the case. It had been argued for the military commander that his actions were an exercise of martial law powers conferred by a proclamation of the President of September 24, 1863 declaring that "all rebels and insurgents, their aiders and abettors, within the United States, • • • shall be subject to martial law, and liable to trial and punishment by courts martial or military commission." (71 U. S. 2, 15-16, 101-102). This court, instead of examining into the question whether martial law had been properly proclaimed and whether it continued in view of the Act of March 3, 1863, answered the contention by holding that in any event martial law "established on such a basis" that is, as conferring power on a military commission to try a civilian for an offense otherwise cognizable in the courts—would be contrary to the Constitution, that under the Constitution military tribunals cannot, under the guise of martial law, exercise judicial powers, but only "if, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law." (71 U. S. 2, 124-7.) The Milligan case does not hold that

struction of the civil courts through the forces of war or rebellion is the only necessity which can vest the military commander with any part of the judicial power. There is here no room for judgment on the part of the military commander that the war could be more expeditiously prosecuted [18] if the courts were closed or if he himself assumed part of their jurisdiction. To a large extent, and with respect to matters having a far greater effect on the success of his command, a military commander is dependent upon congressional action (for example, in providing men and matériel), which Congress must undertake within the framework of the Constitution.

The proclamation of martial law by the Governor was thought by the military commander to vest in him the judicial power of the Territory and the United States

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martial law, in its preventive aspects of arrest and detention of dangerous persons, cannot exist or continue, irrespective of the opening or closing of the courts. *Moyer* v. *Peabody*, *supra*, holds otherwise. Many critics of the Milligan case fail to note that the only point considered by the court in connection with martial law was whether it could serve as a basis for assumption of judicial power by the military. In accord with the Milligan case are *Ex parte McDonald*, 49 Mont. 454, 467, 143 Pac. 947 (1914); *In re Egan*, 8 Fed. Cas. 367, 5 Blatchf. 319 (1866); *In re Kemp*, 16 Wis. 359, 369 (1863). See Underhill, "Jurisdiction of Military Tribunals in the United States over Civilians", 12 Calif. L. Rev. pp. 75-98, 159-178 at p. 178.

Sterling v. *Constantin*, 287 U. S. 378, held that despite a proclamation of martial law, assumed to be valid, the state governor could not override a court order, that the proper use of his power was "to maintain the federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared." (287 U. S. 378, 401-2, 404.) The Milligan case effectively answered the state governor's contentions, this court said (p. 402).

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[18] The reasons assigned by the respondents for the closing of the courts and for their limited reopening amount to this.

ipso facto.[19] It was the Jacksonian theory that the proclamation of martial law *in itself* obstructed the courts and subjected them to the will of the military commander. This theory was promptly rejected by the Louisiana court.[20] Since, under the *Milligan* case the necessity for assumption of judicial powers by a military commander must be based upon actual inability of the courts to function, the proclamation of martial law does not aid the respondents' case.

That not later than December 16, 1941, the courts were open, and ready, willing and able to function (except for the military order preventing it), is demonstrated by the record.[21] The holding of jury trials was forbidden by the military commander, but it does not appear that in fact juries could not have been summoned. If the military commander wished to protect war workers from jury duty he could have seen to it that they were excused[22] and even the issuance of a military order prohibiting the summoning of war workers as jurors was unnecessary.[23]

The trial court found in the *Duncan* case:

> "* * * that at all times during the year 1943 and continuing to this day, conditions were such throughout

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[19] This view first appeared in Governor Poindexter's proclamation of martial law (White R. 75). In General Orders 29 of December 16, 1941 (White R. 82) and General Orders 57 of January 27, 1942 (White R. 86) it was assumed that the mere proclamation of martial law suspended the courts. This fundamental error explains much that was done by the military commander.

[20] *Johnson* v. *Duncan*, 3 Martin (La.) 530, 6 Am. Dec. 675.

[21] White R. 82.

[22] Section 9794, Revised Laws of Hawaii 1945.

[23] This expedient was adopted by General Orders 133 of August 31, 1942, section II, paragraph 5, Appendix. At that date jury trials were resumed and so far as the record shows could have been resumed in the same manner at least as early as December 16, 1941. By General Orders 135, section 7, jury trials in criminal cases were still a matter of grace, not right.

> all the principal islands of the Territory of Hawaii that the regularly constituted civil government was either in efficient operation or fully capable of such operation in all its branches and ordinary departments and was sufficiently equipped, capable and willing to perform all functions for which it was created." (Duncan R. 401.)

As of the date of White's trial the facts were the same (White R. 62-63). No counter showing was made or attempted. As to the loyalty of the persons subject to jury duty, this question was injected by the Circuit Court of Appeals.[24] There was no contention made by the military commander or his counsel, either in the trial court or the Circuit Court of Appeals, that persons of Japanese descent were unfit for jury duty. Since no such contention was made, of course no evidence in support thereof was offered. On the contrary, there have been no known acts of sabotage, espionage or fifth column activities committed by the Japanese in Hawaii either on or subsequent to December 7, 1941.[25]

Even if evidence of disloyalty of persons of Japanese ancestry had been offered, such evidence would have no bearing on White's right to a jury trial for the offense of embezzlement. It likewise would have no bearing on Duncan's case, since the theory that persons of Japanese ancestry could not be trusted to sit on juries, if it ever existed, had been abandoned by the time of Duncan's trial; on and after March 10, 1943 the military orders restored the right of jury trial without making any distinction between offenses involving security (such as sabotage) and other offenses.

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[24] 146 F. (2d) at p. 580.

[25] Duncan, R. Ex. J-3, 686; White, R. Ex. G-3, 370, rec'd p. 44.

The Circuit Court of Appeals also injected the theory [26] that "the mere assembling of juries and the carrying on of protracted criminal trials might well constitute an invitation to disorder as well as an interference with the vital business of the moment." In view of the fact that places of amusement reopened on December 24, 1941,[27] without any limitation as to resort thereto of persons of Japanese ancestry, who (citizens and aliens alike) were free to and did appear in and have resort to all manner of public places, this theory is without foundation in fact, as well as being without support from the military commander.

II. Section 67 of the Hawaiian Organic Act does not have the effect of depriving the inhabitants of the Territory of Hawaii of their constitutional rights, and in particular it does not permit the jurisdiction of military tribunals to be exercised over civilians in causes in which military tribunals could have no jurisdiction in like circumstances within the states of the United States.

Section 67 of the Hawaiian Organic Act provides:

> "*Sec. 67. Enforcement of law.* That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communica-

[26] 146 F. (2d) at p. 580.

[27] General Orders 42, part of Exhibit V in *Duncan* case, not printed.

tion can be had with the President and his decision thereon made known."

31 Stat. 141, 153; 48 U. S. C. 532.

This section does not purport to confer any power inconsistent with Article I, Section 9, Clause 2, Article III, Section 2, Clause 3, or the fifth or sixth amendments of the Constitution, which, as provided in Section 5 of the same act,[28] have "the same force and effect within the said Territory as elsewhere in the United States."

It will be noted that Section 67 provides for suspension of the privilege of the writ of habeas corpus "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it". The Constitution, Article I, Section 9, Clause 2, permits suspension of this privilege "when in cases of rebellion or invasion the public safety may require it". Suspension of the privilege of the writ is not now before this court and we will confine ourselves to the question whether the language of Section 67 manifests any intent to go beyond the Constitution.

The constitutional provision allows suspension of the privilege when the public safety requires it as a protection against rebellion or invasion, and the Hawaiian Organic Act goes no further. By authorizing suspension of the privilege when rebellion or invasion are imminent Section 67 provides for protection "in cases of rebellion or invasion", as contemplated by the Constitution. It could not have been contemplated by the Constitution that the rebellion or invasion must have actually occurred, and thus already have achieved a measure of success, before a case of rebellion or invasion could be deemed to present itself. The *Milligan* case holds that assumption of judicial authority by the military cannot arise from a threatened invasion,

[28] 31 Stat. 141, 48 U. S. C. A. 495, discussed *infra*.

but holds otherwise as to suspension of the privilege of the writ.[29]

In providing in Section 67 of the Hawaiian Organic Act for a proclamation of martial law by the Governor of Hawaii, subject to the control of the President, Congress settled a troublesome question as to the official or body having authority to declare martial law. In the absence of such provision this power might be thought to pertain to the President as Commander in Chief of the Army and Navy, or to the military commander in Hawaii, when called upon by the Governor pursuant to the first part of Section 67.[30] Although the Governor, by the first part of Section 67, was made responsible for the execution of the laws, the power to declare martial law might not be implied therefrom,[31] and having called out the federal troops he might be without power to make the decision on the invocation of martial law, as federal troops ordinarily are not controlled by a governor.[32] On the other hand, it might be thought that further congressional action was required before martial law could be declared.[33] All of these questions were settled by the express provision in Section 67 for a declaration of martial law by the Governor, pending approval or disapproval by the President. Hence provision was made for prompt action locally, but the decision was retained in civilian hands.

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[29] The court upheld the Act of Congress under which this suspension took place, rendering its decision in accordance with the terms of that act (71 U. S. 2, 115). At the same time the court found that there was no invasion of Indiana at the time (*id.*, 126).

[30] Winthrop's Military Law and Precedents, 2d ed., pp. 819-20; Birkhimer, Military Government and Martial Law, p. 12; Glenn, The Army and the Law, p. 185.

[31] 8 Ops. Atty. Gen. 365.

[32] Wiener, A Practical Manual of Martial Law, c. V.

[33] Opinion of the four concurring judges in *Ex parte Milligan*, 71 U. S. 2, 142, and note 30 *supra*.

The inclusion of this provision for martial law suggests no extension of the scope of this power beyond its scope as understood elsewhere in the United States.[34] It previously has been submitted that, as held in the *Milligan* case, authority to proclaim martial law does not include suspension of the courts or the transfer of judicial power to the military commander. That can come about only through closing or obstruction of the courts by the forces of invasion or rebellion.

It may be argued that the resemblance between the wording of Section 67 of the Organic Act and the wording of Article 31 of the Constitution of the Republic of Hawaii gives special significance to the only Hawaiian case decided under the Constitution of that Republic. *In re Kalanianaole*, 10 Haw. 29, decided July 2, 1895 by the Supreme Court of the Republic of Hawaii, arose in the following circumstances.[35] On January 17, 1893 a "Committee of Safety" deposed the Monarchy and established a Provisional Government in Hawaii, to exist "until terms of union with the United States of America have been negotiated and agreed upon."[36] Immediately, on January 19, 1893, commissioners left for the United States to negotiate a treaty of union. This treaty was drawn up and

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[34] Frank. *Ex Parte Milligan* v. *The Five Companies: Martial Law in Hawaii*, 44 Col. L. Rev. 639, 660.

[35] Alexander, Brief History of the Hawaiian People, pp. 316-320; Kuykendall and Gregory, History of Hawaii, pp. 277-282; Message of President Grover Cleveland to Congress, December 18, 1893, transmitting Report of James H. Blount, Special Commissioner to the Hawaiian Islands, dated July 17, 1893; Report of the Committee on Foreign Relations, Sen. Rep. No. 227, 53d Cong., 2d Sess.

[36] Proclamation of January 17, 1893, printed with the Acts of the Provisional Government in the Session Laws of 1893.

signed but the Senate of the United States failed to approve it, and it was withdrawn by President Cleveland.[37]

President Cleveland dispatched a special commissioner to Hawaii, Colonel James H. Blount, who reported that the revolution had been brought about by the aid of the United States minister and United States troops.[38] Following this report the President sent the Honorable Albert S. Willis to Hawaii to demand relinquishment of the authority of the Provisional Government to the Queen, but the Provisional Government refused to accede. This refusal was made December 23, 1893.

The Provisional Government, abandoning hope of obtaining early annexation, proceeded to establish the Republic of Hawaii. After a constitutional convention the Constitution of the Republic was adopted July 3, 1894, effective July 4, 1894. An insurrection, having as its object the overthrow of the Republic and the restoration of the Monarchy broke out on January 6, 1895. There were engagements between the government forces and the insurgents on January 6, 7, and 9, 1895. Finally, on January 17, 1895, all of the leaders had been captured.

On January 7, 1895 the President of the Republic had suspended the privilege of the writ of habeas corpus and had proclaimed martial law. On January 8, 1895 the Provisional Government arrested Jonah Kalanianaole, a Hawaiian, nephew of the Queen-Dowager Kapiolani, widow of Kalakaua. Kalakaua had been king until his death on January 20, 1891, when he was succeeded by his sister

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[37] "An Act to Define and Declare the Claims of the Territory of Hawaii Concerning its Status in the American Union", Session Laws of Hawaii 1923, Act 86, Section 2, items IV to VII inclusive; Message of President Cleveland, *supra*, note 35.

[38] Report of the Committee on Foreign Relations, *supra*, Sen. Rep. No. 227, 53d Con., 2d Sess., 1375, 1391-1402. The Committee did not concur in Blount's report.

Liliuokalani, who was deposed after only two years by the Provisional Government. Kalanianaole's connection with the former monarchy therefore was clear. He was charged before a military commission with misprision of treason. This military commission was organized under a special order of the President of the Republic, which tried nearly two hundred persons for treason and misprision of treason. Before Kalanianaole was tried, the organization of the commission was given legislative authorization by Act 18 of the Laws of 1895 (Republic of Hawaii), approved February 8, 1895, providing for execution of the sentence of such a commission. Kalanianaole was convicted by the military commission, and was committed to Oahu Prison on March 8, 1895. By Act 20 of the Laws of 1895, approved March 15, 1895, the series of trials and convictions was confirmed as authorized. Since no general election had been held under the new Constitution of the Republic, these acts were passed by the Executive and Advisory Councils of the former Provisional Government, pursuant to Article 100 of the Constitution of the Republic.

Following termination of martial law, and restoration of the privilege of the writ on March 18, 1895, Kalanianaole applied to the Supreme Court for a writ of habeas corpus. The court disposed of this petition in its opinion reported in 10 Haw. 29.

The Constitution of the Republic provided for proclamation of martial law and suspension of the privilege of the writ of habeas corpus "in case of rebellion or invasion, or imminent danger of rebellion or invasion, when the public safety requires it."

The court considered the scope and extent of martial law at pages 56-62 of the opinion. It subdivided martial law into two classes:

> "* * * (1) military government, which applies to cases of territorial war, whether the hostile terri-

tory is foreign or within the dominant state, as in the Civil War; and (2) martial law proper, which applies to cases of insurrection or rebellion, in districts which are in contemplation of law friendly, as the Rhode Island insurrection, and that now in question here. * * *"

10 Haw. at p. 56.

It will be noted that the court spoke of the territory under its jurisdiction as "in contemplation of law friendly," a remark the significance of which will appear.

Although professing to find the case before it as of the second type, the Hawaiian court relied on decisions of this court and an opinion of the Attorney General of the United States,[39] all of which related to trials in conquered portions of the insurgent states or conquered portions of foreign territory. These authorities therefore related to military government of the first type outlined by the Hawaiian court. That the court in fact regarded the case as of this type is revealed at page 62 of the opinion where the court said:

"'The obstacle to the due course of justice' may be, 'not of a physical,' but 'of a more formidable' nature—the 'secret machinations' and complicity of friends of the insurgents. To indict and try traitors before jurors who strongly sympathize with them would be a useless farce. See *Birkhimer, supra,* 374. And it was for this reason largely that trials of offenses of every kind by military commissions were authorized under the Reconstruction Acts for several years after the termination of the Civil War; and in Missouri, in 1861, when the ordinary courts were apparently in the unobstructed exercise of their jurisdiction, yet there being only a 'calm exterior, while close underneath rebellion was fermenting, * * * those arrested on suspicion of guilt were tried by military commissions.' *Ib.*

[39] 10 Haw. at p. 60.

> A striking proof of the futility of trials in the regular courts in cases arising under the circumstances of the present case is afforded in the recent history of our own country. In 1889, on the occasion of an insurrection under the Monarchy, of much less magnitude than that of last January under the Republic, and accompanied by much less excitement and hostile feeling, it was impossible to secure convictions of Hawaiians by Hawaiian juries, even on conclusive evidence of guilt. To a large extent the same persons were engaged in both of these insurrections."

It thus appears both from the treatment of the case by the Hawaiian court and from the history preceding the case, that the trials before the military commission represented the effort of a newly established government to maintain itself against a restoration of the old government, which had so many sympathizers that the Hawaiian court feared no jury would convict the offenders. There had been a continuous chain of events from the time of the establishment of the Provisional Government, the failure of the various missions to and from the United States, and the consequent determination of the Provisional Government to make itself permanent, resulting in the establishment of the Republic only six months before the attempted restoration of the former government. Thus the situation in fact, and as revealed by the citations on which the court relied, was dissimilar to that in the *Milligan* case. Moreover, the Hawaiian court reasonably could have relied on the opinion of the four concurring judges in the *Milligan* case, that military jurisdiction over crimes against the security of the government could be conferred by legislative authority, because, before the trial, such legislative authority existed in Act 18 of the laws of 1895, which under the circumstances constituted ratification of the presidential order.[40]

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[40] *Hirabayashi* v. *United States*, 320 U. S. 81, 91.

That Congress, by Section 67 of the Organic Act, intended to enlarge the doctrine of the *Kalanianaole* case so as to permit a military government of the inhabitants of Hawaii in disregard of the Constitution of the United States, is unthinkable. The United States had refused to accomplish the annexation of Hawaii when the circumstances under which the new government was established were in question.[41] In 1898, at the time of annexation, and in 1900 when the Organic Act was passed, there was no thought that annexation was being effected against the will of the people of Hawaii, or that they were for any reason to be treated as subject people, or that they were not entitled to the full protection of the Constitution of the United States.

In enacting Section 67 Congress had no thought of depriving any person in the Territory of Hawaii of any right enjoyed under the Constitution elsewhere in the United States, but in any event Congress could not deprive persons in the Territory of the due process of law and jury trial guaranteed to them by the Constitution. Hawaii is a fully incorporated territory.

Annexation of Hawaii as a part of the United States was accomplished, on the part of the Republic of Hawaii, by ratification on September 9, 1897, of a treaty completed at Washington on June 16, 1897, reading in part as follows:

> "'The Republic of Hawaii and the United States of America, in view of the natural dependence of the Hawaiian Islands upon the United States, of their geographical proximity thereto, of the preponderant share acquired by the United States and its citizens in the industries and trade of said Islands, and of the expressed desire of the government of the Republic of Hawaii that those Islands *should be incorporated into the United States as an integral part thereof*, and under

[41] Note 35, *supra*.

its sovereignty, have determined to accomplish by treaty an object so important to their mutual and permanent welfare.

* * * * * * *

'*Article I.* The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies; and it is agreed that all the territory of and appertaining to the Republic of Hawaii is hereby annexed to the United States of America *under the name of the Territory of Hawaii.*' '' (Italics added.)

On the part of the United States, annexation was accomplished by the Newlands Resolution of July 7, 1898, 30 Stat. 750, this, and the joint resolution annexing Texas as a state, constituting the only examples of annexation of territory by joint resolution. The Newlands Resolution recites that the government of the Republic of Hawaii has "signified its consent" to cede all rights of sovereignty in and over the Hawaiian Islands and then enacts:

"That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, * * *

* * * * * * *

* * * The municipal legislation of the Hawaiian Islands, * * * not inconsistent with this joint resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." (Italics added.)

The cession and consent to which reference was made in the joint resolution were contained in the treaty ratified

by Hawaii on September 9, 1897 providing that the Hawaiian Islands "should be incorporated into the United States as an integral part thereof." In a statement accompanying the joint resolution William R. Day, the Secretary of State, pointed out that the "terms of that treaty, were advisedly incorporated into the joint resolution, because they embodied the terms of cession, which have not only been agreed upon by the two Governments, but which have also been ratified by the Government of the Republic of Hawaii." [42]

Since the treaty of 1897 was the basis upon which annexation was offered by Hawaii it necessarily was the basis upon which annexation was accepted by the United States. The words "incorporated into the United States as an integral part thereof" were used designedly.[43] The provision in the treaty for annexation of Hawaii "under the name of the Territory of Hawaii" in itself implied that Hawaii was to acquire the status of a fully incorporated territory. At that time the *Insular Cases* had not been decided and territorial status implied the same status enjoyed by various parts of the continental United States prior to and as a preliminary to admission to statehood.[44] To this day the name "Territory" has been reserved for the incorporated territories of Hawaii and Alaska.

Congress further expressed the intent to incorporate Hawaii as an integral part of the United States in the provision of the Newlands Resolution perpetuating only so much of the laws of Hawaii as was not contrary to the Constitution of the United States.

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[42] *Hawaii* v. *Mankichi*, 190 U. S. 197, 224.

[43] "An Act to define and declare the claims of the Territory of Hawaii concerning its status in the American union." Session Laws of Hawaii 1923, Act 86, sec. 2, pars. VI, VII, IX-XII.

[44] *O'Donoghue* v. *United States*, 289 U. S. 516, 537.

The annexation proceedings left for consideration the sole question as to whether or not the intended incorporation of Hawaii as an integral part of the United States was already accomplished, or had been deferred until organization of the Territory by the Act of Congress providing for the government of the Hawaiian Islands, contemplated by the Newlands Resolution. This point arose in *Hawaii* v. *Mankichi*, 190 U. S. 197, decided June 1, 1903. The laws of the Republic of Hawaii did not require indictment by a grand jury, substituting therefor an information by the attorney general, approved by a judge. The laws of the Republic further permitted conviction of a defendant by a verdict of nine out of twelve jurors. Mankichi was convicted by this procedure following the Newlands Resolution but prior to the organization of the Territory by the Hawaiian Organic Act. The opinion of the court written by Mr. Justice Brown, in which concurred Associate Justices Holmes and Day, holds that while under the Newlands Resolution any new legislation must conform to the Constitution, where immediate application of the Constitution would leave nothing to take the place of the law abolished until new legislation was enacted Congress did not intend that the Newlands Resolution should accomplish so disastrous a result. Thus, according to this opinion, the Constitution was extended to Hawaii at the time of annexation, subject only to the enactment of legislation necessary to complete the change in status.

Two members of the Court, Associate Justices White and McKenna, were of the opinion that it was not intended to incorporate the islands *eo instanti*, that the purpose was to leave the permanent relation which they were to bear to the government of the United States to await the subsequent determination of Congress. However, the remaining four members of this Court (Chief Justice Fuller and

Associate Justices Harlan, Brewer, and Peckham) were all of the opinion that the Hawaiian Islands had been fully incorporated into the United States by the Newlands Resolution, in accordance with the treaty ratified by Hawaii, and that this incorporation was complete at the time of the Newlands Resolution.

Thus of the nine judges, seven were agreed, and *Hawaii* v. *Mankichi* establishes, that when Hawaii came into the union she was assured of status as an integral part of the United States, although this incorporation may not have been fully accomplished until 1900. The remaining two were of the opinion that the status of Hawaii was still in doubt after the Newlands Resolution, but stated that by the Hawaiian Organic Act[45] "the islands were undoubtedly made a part of the United States in the fullest sense."[46] That incorporation of the Territory was fully accomplished by 1900, the date of enactment of the Organic Act, has never been doubted.[47]

Section 5 of the Organic Act of 1900 provided and still provides:

> "That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; * * *".
>
> 31 Stat. 141; 48 U. S. C. 495.[48]

The Organic Act supplied such omissions as had existed at the time of the Newlands Resolution. By Section 7[49]

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[45] 31 Stat. 141.

[46] *Hawaii* v. *Mankichi*, *supra*, 220.

[47] *Downes* v. *Bidwell*, 182 U. S. 244, 345; *Rassmussen* v. *United States*, 197 U. S. 516, 534-5; *Farrington* v. *Tokushige*, 273 U. S. 284, 299.

[48] The words "including laws carrying general appropriations" were inserted by an amendment, 36 Stat. 443.

[49] 31 Stat. 141, 142-143.

Congress reviewed all of the laws of Hawaii and specifically repealed many of them, and by Section 83[50] Congress provided how juries should be constituted and provided for the drawing of grand juries and for unanimous jury verdicts in criminal cases.

The extension of the Constitution to Hawaii, declared in Section 5 of the Organic Act, was complete and without exception.[51] Section 67, relating to martial law, therefore must be interpreted in the light of Section 5. As previously submitted there is nothing in it inconsistent with Section 5. Moreover, as Congress, by the Newlands Resolution, had consented to the incorporation of the Hawaiian Islands as an integral part of the United States as soon as the organization of the Territory could be completed, the status thus conferred at the time of annexation could not be withdrawn by Congress.[52] Congress was without power to enact any law which would have the effect of depriving any person in the Territory of the right of trial by jury guaranteed him by the Constitution. In view of the express terms of the cession on the part of Hawaii, accepted by the joint resolution of annexation, any ruling by this Court that Congress, by Section 67 of the Organic Act, withheld constitutional rights protecting the lives, liberty and property of the inhabitants of Hawaii, would be tantamount to a breach of the condition upon which the cession was effected by Congress.

Conclusion

It is respectfully submitted that the petitioners' commitment to prison by order of a military tribunal was invalid and unconstitutional, in Hawaii as elsewhere in the United

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[50] 31 Stat. 141, 157; 48 U. S. C. 635.

[51] The legislative history is reviewed in Frank, *Ex parte Milligan* v. *The Five Companies: Martial Law in Hawaii*, 44 Col., L. R. 639, 659.

[52] *Bassmussen* v. *United States, supra.*

States, and that the decision of the Circuit Court of Appeals of the Ninth Circuit should be reversed and the decisions of the United States District Court for the District of Hawaii should be affirmed.

Dated: November —, 1945.

Respectfully submitted,

C. NILS TAVARES,
Attorney General of Hawaii,
Amicus Curiae.

HEATON L. WRENN,
J. RUSSELL CADES,
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RHODA V. LEWIS,
Assistant Attorney General of Hawaii,
Of Counsel.

APPENDIX

The White case, No. 15 (R. 79-88) carries the record relating to criminal trials in the courts to the date of White's arrest and trial, August 20-25, 1942. The record in the Duncan case, No. 14, picks up this history with General Order 2, issued March 10, 1943 (R. 98-118) pursuant to the proclamations of February 8, 1943 (R. 14-18, 77-81). Intervening were General Order No. 133 of August 31, 1942, and General Order No. 135 of September 4, 1942, introduced in the Duncan case as part of Exhibit V but not printed in the record. These orders are reproduced below.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
IOLANI PALACE
HONOLULU, T. H.

31 August, 1942

General Orders, No. 133:

SECTION I. Declaration and Finding.
SECTION II. Operation of the Civil Courts.
SECTION III. Future Modification of this Order.

SECTION I. Declaration and Finding.—Hawaii constitutes the main Pacific outpost of the United States, and accordingly must be regarded as a fortress to whose defense the entire population of the Islands is committed. Its man power and its economic resources must be subject to a single ultimate control. Martial law has been declared and the emergency which called it forth still prevails. The privilege of the writ of habeas corpus has been suspended and remains suspended. For all this there is authority in Section 67 of the Organic Act. The measures of military control have from time to time been modified in the light of experience and as changes in conditions have dictated. By General Orders No. 29 of December 16, 1941, the civil courts were reopened, subject to certain restrictions. It is now consistent with the public safety and the national defense that they be permitted more fully to exercise the

powers normally exercised by them. They cannot, however, be allowed to interfere with the measures required by military security. It is to be understood that the relaxation herein specified is intended to return to the courts criminal prosecutions and civil litigation to the extent that war conditions permit. However, this action is experimental in nature and the Military Governor reserves the right further to limit the jurisdiction of the courts or to close them entirely, if that course shall be necessary.

SECTION II. Operation of the Civil Courts.—In accordance with the above declaration and finding, the civil courts are now authorized to exercise their normal jurisdiction, subject, nevertheless, to the following restrictions and limitations:

1. The privilege of the writ of habeas corpus has been and remains suspended.

2. No criminal proceedings shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor.

3. No civil suit, action or other proceeding shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor for any act done within the scope of such employment.

4. (a) No judgment by default shall be entered against any person who is in the Army, Navy, Marine Corps, or Coast Guard of the United States. No judgment by default shall be entered against any person employed or engaged in any occupation, business, or activity under the supervision or direction of the Military Governor, or otherwise essential to the national defense, until seven (7) days shall have elapsed after the return day provided in the summons or by the statutes of the Territory of Hawaii. A default judgment hereafter entered shall be set aside upon the mere request of the defendant or his attorney,

made either orally or in writing, to the court, or clerk thereof, in which the case was pending at the time of the entry of such judgment, if such request be so made within fifteen days after entry of such default judgment. Leave to appear or answer shall be allowed or extended for a like period of fifteen days after such default judgment shall have been set aside. In the event the defendant, after having been allowed to so appear or answer as aforesaid, shall fail to so appear or answer as aforesaid within said period of fifteen days, the court again may enter or cause to be entered the default of the defendant and enter or order entered judgment by default against such defendant. A defendant shall have no right upon his mere request to have a default judgment set aside a second time in the same case.

(b) The provisions contained in this paragraph shall apply to pending cases as well as to cases hereafter commenced or instituted.

(c) A verbatim copy of the contents of this paragraph shall be attached to the summons and served upon the defendant or defendants in cases hereinafter commenced or instituted.

5. No person referred to in paragraphs 2 and 3 of this section, with respect to whom a certificate of exemption is issued by the Military Governor or under his authority, shall be selected or listed by any jury commission as a trial juror or grand juror and no subpoena issued to require the attendance of any such person in such courts shall be valid. Based upon the requirements for labor in the National Defense, the Military Governor will from time to time prescribe the maximum number of persons who may be summoned or held for jury service.

6. (a) No person, firm, or corporation shall institute, maintain, or prosecute any action, suit or other proceeding in any circuit or district court in the City and County of

Honolulu, Territory of Hawaii, to recover the possession of any premises used for housing accommodations as defined in Section 1, Ordinance 941 of the City and County of Honolulu, Territory of Hawaii, without first having obtained an order of the Rent Control Commission of said City and County of Honolulu that said plaintiff or plaintiffs is or are entitled to the possession of said premises, and no such suit, action, or other proceeding shall be instituted, maintained, or prosecuted for the purpose aforesaid in any such said circuit or district court without such order having been first obtained by the said plaintiff or plaintiffs in such suit, action, or other said proceeding.

(b) This section shall be retroactive and shall be deemed to have been in full force and effect as of and after January 27, 1942, and shall be retroactive and applicable to any such action, suit, or proceedings, now pending in said circuit and district courts as well as to those hereafter instituted, maintained, or prosecuted in said circuit and district courts.

(c) Payments of rent shall continue to be made at the dates the rent becomes due on all housing accommodations in accordance with the agreement or procedure previously effected by the parties thereto. Landlords shall refund any unused portions of rent paid in advance to any tenants who are duly evacuated from the Territory of Hawaii.

7. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued will continue to be triable by Military Commissions or Provost Courts.

8. The Military Governor may waive any restriction or limitation established by the foregoing paragraphs, with respect to any person, case, or matter, or class of persons, cases, or matters.

SECTION III. Future Modification of this Order.—This order shall be subject to modification, or revocation, by the

Military Governor whenever in his judgment such action is necessary.

All prior orders inconsistent herewith are hereby revoked.

By order of the Military Governor:
(Signed) THOMAS H. GREEN,
Brigadier General, A. U. S., Executive.

A True Copy: (Signed) James F. Hanley, Lieut. Colonel, J. A. G. D.

TERRITORY OF HAWAII

IOLANI PALACE

HONOLULU, T. H.

4 September 1942.

General Orders, No. 135:

Jurisdiction of Courts.—1. *Criminal Jurisdiction: General.* This General Order is issued to define the criminal jurisdiction to be exercised by the Federal and Territorial courts and the courts established by the Military Governor, in accordance with General Orders No. 133, this office, 31 August 1942.

2. *Jurisdiction of Federal Courts.* The United States District Court for the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. 10 U. S. C. A. Section 1393 (Protection of uniform of the Army, Navy, Marine Corps, etc.); 18 U. S. C. A. Sections 1 to 17 inclusive (Offenses against the existence of the Government); 18 U. S. C. A. Section 76a and 76b (Prohibiting reproduction of official badges, identification cards, and other insignia); 18 U. S. C. A. Sections 94 to 98 inclusive (Offenses against the operations of the Government, such as enticing desertion from the Army or Navy, etc.); 50 U. S. C. A. Sections 31 to 36 inclusive (espionage); 50 U. S. C. A. Sections 45 to 45d inclusive (Photographing, etc., defensive installations); 50 U. S. C. A. Sections 101 to 106 inclusive (Wilful destruction, etc., of war or national defense material); Violations of the Selective Training and Service Act of 1940; and Federal statutes relating to Prostitution;

b. All other Federal statutes heretofore enacted, although not hereinabove enumerated, and all other Federal Statutes hereafter enacted of the class of criminal offenses herein set forth, or relating to offenses directed against the Government, or violations in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

3. *Jurisdiction of Territorial Courts.* All courts of the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. Chapter 163, R. L. H. 1935 (Anarchistic Publications and Criminal Syndicalism); Chapter 178, R. L. H. 1935 (Disloyalty and desecration of flag); Chapter 180, R. L. H. 1935 (Disorderly House and Drunkenness); Chapter 199, R. L. H. 1935 (Military organizations); Chapter 205, R. L. H. 1935 (Riots, unlawful assemblies); Chapter 208, R. L. H. 1935 (Secret Associations); Chapter 214, R. L. H. 1935 (Vagrants, Disorderly persons, Loitering); Section 5710, R. L. H. 1935 (Places of Prostitution, etc.); Violations of any law, rule or regulation of the Territory or ordinance of any county or city and county relating to public health; assault or assault and battery on police officers or other law enforcement officers in violation of Section 5657, R. L. H. 1935; Act 123, S. L. H. 1937 (Carrying Deadly Weapons); Act 82, S. L. H. 1941 (Sabotage); Violations of traffic ordinances of any county or city and county relating to drunken driving; Violations of territorial traffic laws or traffic ordinances of any county or city and county during blackout hours as established by the Military Governor or during periods of alert as announced by the Military Governor.

b. All other Territorial statutes county or city and county ordinances, rules and regulations heretofore enacted, or promulgated although not hereinabove enumerated, and all other Territorial statutes hereafter enacted or promul-

gated by the class of criminal offenses herein set forth, or relating to offenses directed against the Federal or Territorial Governments, or relating to offenses in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

4. *Jurisdiction over Persons:* The Federal and Territorial courts shall not assume criminal jurisdiction over the following persons except when authority to do so is first obtained from the Military Governor:

a. Members of the armed forces of the United States;

b. Persons employed or engaged in any occupation, business, or defense activity under the direction of the Army, Navy or Military Governor where the offense is committed within the scope of their employment. The determination of the status of such persons, and whether an offense is committed within the scope of employment shall rest with the Military Governor whose decision shall be final.

5. *Jurisdiction of Military Commissions and Provost Courts Retained.* Military Commissions and Provost Courts shall retain and exercise all jurisdiction and powers heretofore granted them by the Military Governor except as otherwise provided herein.

6. *Determination of Jurisdiction where Questioned.* Whenever the jurisdiction of the Federal or Territorial Courts, or Military Commissions or Provost Courts, to hear and determine any case shall in any manner or for any reason be questioned, then in every such case, the issue of jurisdiction shall be determined by the Military Governor whose decision shall be final; and, notwithstanding any other provision of this or any other order of the Military Governor, the Federal or Territorial Court, or Military Commission or Provost Court, as the case may be, shall

take, have and exercise jurisdiction in accordance with such determination and decision.

7. *Special Cases.* Notwithstanding any provision of this or any other order of the Military Governor to the contrary, the Military Governor may, whenever in his opinion such action be necessary in the public interest, exercise jurisdiction at any time over any crime or offense or person, and direct that the same be tried before a Military Commission or Provost Court.

8. *Future Modification of this Order.* This order shall be subject to modification or revocation, by the Military Governor whenever in his judgment such action is necessary.

9. *Effective Date.* This order shall take effect forthwith. Criminal cases pending before the Provost Courts and Military Commission of the class which is within the jurisdiction herein given to the Federal and Territorial courts and in which no plea has been entered shall be tried and determined by the Federal or Territorial court, as the case may be.

By order of the Military Governor:

(Signed) THOMAS H. GREEN,
Brigadier General, A. U. S., Executive.

A True Copy:

(Signed) JAMES F. HANLEY,
Lieut. Colonel, J. A. G. D.

pp. 35, 40

SUPREME COURT OF THE UNITED STATES.

Nos. 14 and 15.—October Term, 1945.

Lloyd C. Duncan, Petitioner, 14 *vs.* Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu. Harry E. White, Petitioner, 15 *vs.* Wm. F. Steer, Colonel, Infantry, United States Army, Provost Marshal, Central Pacific Area.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The petitioners in these cases were sentenced to prison by military tribunals in Hawaii. Both are civilians. The question before us is whether the military tribunals had power to do this. The United States District Court for Hawaii in habeas corpus proceedings held that the military tribunals had no such power and ordered that they be set free. The Circuit Court of Appeals reversed, and ordered that the petitioners be returned to prison. Both cases thus involve the rights of individuals charged with crime and not connected with the armed forces to have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards. Since these judicial safeguards are prized privileges of our system of government we granted certiorari.

The following events led to the military tribunals' exercise of jurisdiction over the petitioners. On December 7, 1941, immediately following the surprise air attack by the Japanese on Pearl Harbor, the Governor of Hawaii by proclamation undertook to suspend the privilege of the writ of habeas corpus and to place the Territory under "martial law." Section 67 of the Hawaiian

Organic Act, 31 Stat. 141,[1] authorizes the Territorial Governor to take this action "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it." His action was to remain in effect only "until communication can be had with the President and his decision thereon made known." The President approved the Governor's action on December 9th.[2] The Governor's proclamation also authorized and requested the Commanding General, "during . . . the emergency and until danger of invasion is removed, to exercise all the powers normally exercised" by the Governor and by "the judicial officers and employees of the Territory."

Pursuant to this authorization the commanding general immediately proclaimed himself Military Governor and undertook the defense of the Territory and the maintenance of order. On December 8th, both civil and criminal courts were forbidden to summon jurors and witnesses and to try cases. The commanding general established military tribunals to take the place of the courts. These were to try civilians charged with violating the laws of the United States and of the Territory, and rules, regulations, orders or policies of the Military Government. Rules of evidence and procedure of courts of law were not to control the military trials. In imposing penalties the military tribunals were to be "guided by, but not limited to the penalties authorized by the court martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases." The rule announced was simply that punishment was "to be commensurate with the offense committed" and that

[1] "That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary, he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

[2] The District Court heard much evidence and from it found as follows on this subject: "By radio the Governor of Hawaii on December 7, 1941, notified the President of the United States simply that he had placed the Territory under martial law and suspended the writ. The President's approval was requested and it was granted by radio on December 8, 1941. Not until 1943 was the text of the Governor's December 7 proclamation furnished Washington officials, and it is still doubtful if it has yet been seen by the President."

the death penalty might be imposed "in appropriate cases." Thus the military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators. The sentences imposed were not subject to direct appellate court review, since it had long been established that military tribunals are not part of our judicial system. *Ex parte Vallandigham,* 1 Wall. 243. The military undoubtedly assumed that its rule was not subject to any judicial control whatever, for by orders issued on August 25, 1943, it prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney.. Military tribunals could punish violators of these orders by fine, imprisonment or death.

White, the petitioner in No. 15, was a stockbroker in Honolulu. Neither he nor his business was connected with the armed forces. On August 20, 1942, more than eight months after the Pearl Harbor Attack, the military police arrested him. The charge against him was embezzling stock belonging to another civilian in violation of Chapter 183 of the Revised Laws of Hawaii. Though by the time of White's arrest the courts were permitted "as agents of the Military Governor" to dispose of some non-jury civil cases, they were still forbidden to summon jurors and to exercise criminal jurisdiction. On August 22nd, White was brought before a military tribunal designated as a "Provost Court." The "Court" orally informed him of the charge. He objected to the tribunal's jurisdiction but the objection was overruled. He demanded to be tried by a jury. This request was denied. His attorney asked for additional time to prepare the case. This was refused. On August 25th he was tried and convicted. The tribunal sentenced him to five years imprisonment. Later the sentence was reduced to four years.

Duncan, the petitioner in No. 14, was a civilian shipfitter employed in the Navy Yard at Honolulu. On February 24th, 1944, more than two years and two months after the Pearl Harbor attack, he engaged in a brawl with two armed Marine sentries at the yard. He was arrested by the military authorities. By the time of his arrest the military had to some extent eased the stringency of military rule. Schools, bars and motion picture theatres

had been reopened. Courts had been authorized to "exercise their normal functions." They were once more summoning jurors and witnesses and conducting criminal trials. There were important exceptions, however. One of these was that only military tribunals were to try "Criminal Prosecutions for violations of military orders."[3] As the record shows, these military orders still covered a wide range of day to day civilian conduct. Duncan was charged with violating one of these orders, paragraph 8.01, Title 8, of General Order No. 2, which prohibited assault on military or naval personnel with intent to resist or hinder them in the discharge of their duty. He was, therefore, tried by a military tribunal rather than the Territorial Court, although the general laws of Hawaii made assault a crime. Revised L. H. 1935, ch. 166. A conviction followed and Duncan was sentenced to six months imprisonment.

Both White and Duncan challenged the power of the military tribunals to try them by petitions for writs of habeas corpus filed in the District Court for Hawaii on March 14 and April 14, 1944, respectively. Their petitions urged both statutory and Constitutional grounds. The court issued orders to show cause. Returns to these orders contended that Hawaii had become part of an active theatre of war constantly threatened by invasion from without; that the writ of habeas corpus had therefore properly been suspended and marital law had validly been established in accordance with the provisions of the Organic Act; that consequently the District Court did not have jurisdiction to issue the writ; and that the trials of petitioners by military tribunals pursuant to orders by the Military Governor issued because of military necessity were valid. Each petitioner filed a traverse to the returns, which traverse challenged among other things the suspension of habeas corpus, the establishment of martial law and the validity of the Military Governor's orders, asserting that such action could not be taken except when required by military necessity due to actual or threatened invasion, which even if it did exist on December 7, 1941, did not exist when the

[3] In addition, § 3 of a Proclamation of February 8, 1943, which returned some power to the civil authorities, had reserved a right in the Military Governor to resume any or all of the powers returned to the civilian government. In approving this Proclamation the President had expressed his confidence that the Military would "refrain from exercising . . . authority over . . . normally civil functions" and his hope that there would "be a further restoration of civil authority as and when the situation permits."

petitioners were tried; and that, whatever the necessity for martial law, there was no justification for trying them in military tribunals rather than the regular courts of law. The District Court, after separate trials found in each case, among other things, that the courts had always been able to function but for the military orders closing them, and that consequently there was no military necessity for the trial of petitioners by military tribunals rather than regular courts.[4] It accordingly held the trials void and ordered the release of the petitioners.

The Circuit Court of Appeals, assuming without deciding that the District Court had jurisdiction to entertain the petitions, held the military trials valid and reversed the ruling of the District Court. 146 F. 2d 576. It held that the military orders providing for military trials were fully authorized by Section 67 of the Organic Act and the Governor's actions taken under it. The Court relied on that part of the section which as we have indicated authorizes the Governor with the approval of the President to proclaim "martial law", whenever the public safety requires it. The Circuit Court thought that the term "martial law" as used in the Act denotes among other things the establishment of a "total military government" completely displacing or subordinating the regular courts, that the decision of the executive as to what the public safety requires must be sustained so long as that decision is based on reasonable grounds and that such reasonable grounds did exist.

In presenting its argument before this Court the government for reasons set out in the margin[5] abandons its contention as to the suspension of the writ of habeas corpus and advances the argument employed by the Circuit Court for sustaining the trials and convictions of the petitioners by military tribunals. The petitioners contend that "martial law" as provided for by § 67 did not authorize the military to try and punish civilians such as petitioners and urge further that if such authority should be inferred from the Organic Act, it would be unconstitutional. We need decide the constitutional question only if we agree with the government that Congress did authorize what was done here.

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[4] We do not set out the other grounds of challenge since under the view we take we do not reach them.

[5] The Government points out that since the privilege of the writ was restored and martial law terminated by Presidential Proclamation on October 24, 1944, petitioners are entitled to their liberty if the military tribunals were without jurisdiction to try them. We therefore do not pass upon the validity of the order suspending the privilege of habeas corpus or the power of the military to detain persons under other circumstances and conditions.

Did the Organic Act during the period of martial law give the armed forces power to supplant all civilian laws and to substitute military for judicial trials under the conditions that existed in Hawaii at the time these petitioners were tried? The relevant conditions, for our purposes, were the same when both petitioners were tried. The answer to the question depends on a correct interpretation of the Act. But we need not construe the Act, insofar as the power of the military might be used to meet other and different conditions and situations. The boundaries of the situation with reference to which we do interpret the scope of the Act can be more sharply defined by stating at this point some different conditions which either would or might conceivably have affected to a greater or lesser extent the scope of the authorized military power. We note first that at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the buildings necessary to carry on the business of the courts. In fact, the buildings had long been open and actually in use for certain kinds of trials. Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces,[6] those directly connected with such forces,[7] or enemy belligerents, prisoners of war, or others charged with violating the laws of war.[8] We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.[9] For Hawaii since annexation has been held by

[6] Wilkes *v.* Dinsman, 7 How. 89; Ex parte Reed, 100 U. S. 13; Martin *v.* Mott, 12 Wheat. 19; In re Grimley, 137 U. S. 147; Johnson *v.* Sayre, 158 U. S. 109; Carter *v.* McClaughry, 183 U. S. 365.

[7] Ex parte Gerlach, 247 Fed. 616; Ex parte Falls, 251 Fed. 415; Ex parte Jochen, 257 Fed. 200; Hines *v.* Mikell, 259 Fed. 28. See cases and statutes collected and discussed in Underhill, *supra*, 12 Cal. L. Rev. 81-98.

[8] Ex parte Quirin, 317 U. S. 1; In the Matter of General Tomoyuki Yamashita, — U. S. —. See 10 U. S. C. §§ 1553, 1554. See also cases and statutes collected and discussed in Underhill, supra, 12 Cal. L. Rev. 81-98.

[9] Cross *v.* Harrison, 16 How. 164; Leitensdorfer *v.* Webb, 20 How. 176; The Prize Cases, 2 Black 635; Mrs. Alexander's Cotton, 2 Wall. 404; Ford *v.* Surget, 97 U. S. 594, 604; New Orleans *v.* Steamship Co., 20 Wall. 387, 393; Dow *v.* Johnson, 100 U. S. 158, 166; The Grapeshot, 9 Wall. 129; Mechanics' Bank *v.* Union Bank, 22 Wall. 276. Nor is this a case where violators of military orders are to be tried by regular courts. Cf. Hirabayashi *v.* United States, 320 U. S. 81.

and loyal to the United States. Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war.[10] And finally, there was no specialized effort of the military, here, to enforce orders which related only to military functions, such as, for illustration, curfew rules or blackouts. For these petitioners were tried before tribunals set up under a military program which took over all government and superseded all civil laws and courts. If the Organic Act, properly interpreted, did not give the armed forces this awesome power, both petitioners are entitled to their freedom.

I.

In interpreting the Act we must first look to its language. Section 67 makes it plain that Congress did intend the Governor of Hawaii, with the approval of the President, to invoke military aid under certain circumstances. But Congress did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals. Cf. *Coleman* v. *Tennessee*, 97 U. S. 509, 514. If a power thus to obliterate the judicial system of Hawaii can be found at all in the Organic Act, it must be inferred from § 67's provision for placing the Territory under "martial law." But the term "martial law" carries no precise meaning. The Constitution does not refer to "martial law" at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times. By some it has been identified as "military law" limited to members of, and those connected with, the armed forces. Others have said that the term does not imply a system of established rules but denotes simply some kind of day to day expression of a General's will dictated by what he considers the imperious necessity of the moment. See *United States* v. *Diekelman*, 92 U. S. 520, 526. In 1857 the confusion as to the meaning of the phrase was so great that the Attorney General in an official opinion had this to say about it: "The Common Law authorities and commenta-

[10] Moyer v. Peabody, 212 U. S. 78; Ex parte Milligan, 4 Wall. 2, 125, 126; Luther v. Borden, 7 How. 1, 45, 46; see Sterling v. Constantin, 287 U. S. 378, 400; Fairman, The Law of Martial Rule, Chicago 1943, 209-218.

tors afford no clue to what martial law as understood in England really is . . . In this county it is still worse." 80 Op. Atty. Gen. 365, — What was true in 1857 remains true today.[11] The language of § 67 thus fails to define adequately the scope of the power given to the military and to show whether the Organic Act provides that courts of law be supplanted by military tribunals.

II.

Since the Act's language does not provide a satisfactory answer, we look to the legislative history for possible further aid in interpreting the term "martial law" as used in the statute. The government contends that the legislative history shows that Congress intended to give the armed forces extraordinarily broad powers to try civilians before military tribunals. Its argument is as follows: That portion of the language of § 67 which prescribes the prerequisites to declaring martial law is identical with a part of the language of the original Constitution of Hawaii. Before Congress enacted the Organic Act the Supreme Court of Hawaii had construed that language as giving the Hawaiian President power to authorize military tribunals to try civilians charged with crime whenever the public safety required it. *In re Kalanianaole*, 10 Hawaii 29. When Congress passed the Organic Act it simply enacted the applicable language of the Hawaiian Constitution and with it the interpretation of that language by the Hawaiian Supreme Court.

In disposing of this argument we wish to point out at the outset that even had Congress intended the decision in the *Kalaniaole* case to become part of the Organic Act, that case did not go so far as to authorize military trials of the petitioners for these reasons. There the defendants were insurrectionists taking part in the very uprising which the military were to suppress, while here the petitioners had no connection with any organized resistance to the armed forces or the established government. If, on the other hand, we should take the *Kalanianaole* case to authorize

[11] For discussions of the great contrast of views see the following writings: Fairman, *supra*, Ch. II; Wiener, A Practical Manual of Martial Law, Harrisburg 1940, Ch. 1; Military Aid to the Civil Power, Fort Leavenworth 1925, pp. 230-232; Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians*, (1924) 12 Cal. L. Rev. 75, 163-178; Ballentine, *Qualified Martial Law* (1915) 14 Mich. L. Rev. 102, 203, 204; Max Radin, *Martial Law and the State of Siege* (1942) 30 Cal. L. Rev. 634.

the complete supplanting of courts by military tribunals, we are certain that Congress did not wish to make that case part of the Organic Act. For that case did not merely uphold military trials of civilians but also held that courts were to interfere only when there was an obvious abuse of discretion, which resulted in cruel and inhuman practices or the establishment of military rule for the personal gain of the President and the armed forces. But courts were not to review whether the President's action, no matter how unjustifiable, was necessary for the public safety. As we shall indicate later, military trials of civilians charged with crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstance offered by the government can hardly suffice to persuade us that Congress was willing to enact a Hawaiian Supreme Court decision permitting such a radical departure from our steadfast beliefs.[12]

Partly in order to meet this objection the government further contends that Congress in enacting the *Kalanianaole* case, not only authorized military trials of civilians in Hawaii, but also could and intended to provide that "martial law" in Hawaii should not be limited by the United States Constitution or by established Constitutional practice. But when the Organic Act is read as a whole and in the light of its legislative history it becomes clear that Congress did not intend the Constitution to have a limited application to Hawaii. Along with § 67 Congress enacted § 5 of the Organic Act which provides "that the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States." 31 Stat. 141. Even when Hawaii was first annexed Congress had provided that the Territory's existing laws should remain in effect unless contrary to the Constitution. 30 Stat. 750. And the House Committee Report in explaining § 5 of the Organic Act stated: "Probably the same result would obtain without this provision under Section 1891, chapter 1, Title XIII, of the Revised Statutes, *but to prevent possible question*, the section is inserted in the bill."[13] (Italics

[12] We point out in this connection that by Section 83 of the Organic Act Congress provided how juries should be constituted and provided for the drawing of grand juries and for unanimous jury verdicts in criminal cases. 31 Stat. 141, 157.

[13] *Government for the Territory of Hawaii*, H. Rep. No. 305, 56th Cong., 1st Sess., p. 10. In the House, Representative Knox, the Republican leader

supplied.) Congress thus expressed a strong desire to apply the Constitution without qualification.

It follows that civilians in Hawaii are entitled to the Constitutional guarantee of a fair trial to the same extent as those who live in any other part of our country. We are aware that conditions peculiar to Hawaii might imperatively demand extraordinarily speedy and effective measures in the event of actual or threatened invasion. But this also holds true for other parts of the United States. Extraordinary measures in Hawaii, however necessary, are not supportable on the mistaken premise that Hawaiian inhabitants are less entitled to Constitutional protection than others. For here Congress did not in the Organic Act exercise whatever power it might have had to limit the application of the Constitution. Cf. *Hawaii* v. *Mankichi*, 190 U. S. 197. The people of Hawaii are therefore entitled to Constitutional protection to the same extent as the inhabitants of the 48 States. And Congress did not enact the Hawaiian Supreme Court's decision in the *Kalanianaole* case and, thus, authorize the military trials of petitioners. Whatever power the Organic Act gave the Hawiian military authorities, such power must therefore be construed in the same way as a grant of power to troops stationed in any one of the states.

III.

Since both the language of the Organic Act and its legislative history fail to indicate that the scope of "martial law" in Hawaii includes the supplanting of courts by military tribunals, we must look to other sources in order to interpret that term. We think the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act. Have the principles and practices developed during the birth and growth of our political institutions been

for the bill, stated: "This bill, in so many words extends the Constitution to Hawaii, so that there has not been practically a moment of time since the Hawaiian Islands were annexed to the United States that the Constitution has not been the standard by which all the laws of that country must be measured . . . *The decisions of the Supreme Court of the United States will be equally operative in Hawaii as in any portion of the United States as to any constitutional rights which he possesses.*" 33 Cong. Rec. 3800 (1900). See the following decisions of this Court relating to the applicability of the Constitution to United States Territories: Hawaii *v.* Mankichi, 190 U. S. 197; Rassmussen *v.* United States, 197 U. S. 516; Farrington *v.* Tokushige, 273 U. S. 284. See also Frank, *Ex Parte Milligan* v. *The Five Companies: Martial Law in Hawaii* (1944) 44 Col. L. Rev. 639, 658-660.

such as to persuade us that Congress intended that loyal civilians in loyal territory should have their daily conduct governed by military orders substituted for criminal laws, and that such civilians should be tried and punished by military tribunals? Let us examine what those principles and practices have been, with respect to the position of civilian government and the courts and compare that with the standing of military tribunals throughout our history.

People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which according to the government Congress has authorized here. In this country that fear has become part of our cultural and political institutions. The story of that development is well known and we see no need to retell it all. But we might mention a few pertinent incidents. As early as the 17th Century our British ancestors took political action against aggressive military rule. When James I and Charles I authorized martial law for purposes of speedily punishing all types of crimes committed by civilians the protest led to the historic Petition of Right[14] which in uncompromising terms objected to this arbitrary procedure and prayed that it be stopped and never repeated.[15] When later the American colonies declared their independence one of the grievances listed by Jefferson was that the King had endeavored to render the military superior to the civil power. The executive and military officials who later found it necessary to utilize the armed forces to keep order in a young and turbulent nation, did not lose sight of the philosophy embodied in the Petition of Right and the Declaration of Independence, that existing civilian government and especially the courts were not to be interfered with by the exercise of military power. In 1787, the year in which the Constitution was formulated, the Governor of Massachusetts colony used the militia to cope with Shay's rebellion. In his instructions to the Commander of the troops the Governor listed the "great objects" of the mission. The troops were to "protect the judicial courts . . .", "to assist the civil magistrates in executing the laws . . .", and to "aid them in apprehending the disturbers of the public

[14] 3 Chas. 1, c. 1.

[15] Hallam, Constitutional History, c. 3. See also discussions in dissent in Luther v. Borden, 7 How. 1, 48, 63; In re McDonald, 49 Mont. 454, 468.

peace . . . ." The Commander was to consider himself "constantly as under the direction of the civil officer, saving where any armed force shall appear and oppose . . . [his] . . . marching to execute these orders."[16] President Washington's instructions to the Commander of the troops sent into Pennsylvania to suppress the Whiskey Rebellion of 1794 were to the same effect. The troops were to see to it that the laws were enforced and were to deliver the leaders of armed insurgents to the regular courts for trial. The President admonished the Commanding General "that the judge can not be controlled in his functions."[17] In the many instances of the use of troops to control the activities of civilians that followed, the troops were generally again employed merely to aid and not to supplant the civilian authorities.[18] The last noteworthy incident before the enactment of the Organic Act was the rioting that occurred in the Summer of 1892 at the Coeur-d'Alene mines of Shoshone County, Idaho. The President ordered the regular troops to report to the Governor for instructions and to support the civil authorities in preserving the peace. Later the State Auditor as agent of the Governor, and not the Commanding General, ordered the troops to detain citizens without trial and to aid the Auditor in doing all he thought necessary to stop the riot.[19] Once more, the military authorities did not undertake to supplant the courts and to estab-

[16] Federal Aid In Domestic Disturbances, Senate Documnt No. 263, 67th Cong., 2d Sess., 10.

[17] *Id.* pp. 31, 32. See also on the same subject the dissent in Luther *v.* Borden, *supra*, 7 How. at 77-81.

[18] This appears from the facts related throughout Senate Document No. 263, 67th Cong., 2d Sess., *supra*.

After the passing of the Organic Act disturbances in the coal fields of West Virginia, a longshoremen's strike in Galveston and a packers' strike in Nebraska City, all led to criminal trials of civilians by military tribunals which were upheld by decisions of state and lower federal courts. State *ex rel.* Mays *v.* Brown, 71 W. Va. 519; Ex parte Jones, 71 W. Va. 567; U. S. *ex rel.* McMasters *v.* Wolters, 268 Fed. 69; U. S. *ex rel.* Seymour *v.* Fisher, 280 Fed. 208. But cf. In re McDonald, *supra*, 49 Mont. 454. All these cases rested on the ground that the governor's determination of the existence of insurrection conclusively established that all the governor had done was legal. The basis of these decisions was definitely held erroneous in Sterling *v.* Constantin, 287 U. S. 378, where this Court said: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." 287 U. S. at 401. As one commentator puts it this Court "has knocked out the prop" on which these aforementioned cases rested. Wiener, A Practical Manual of Martial Law, 1940, p. 116.

[19] Senate Document No. 263, 67th Cong., 2d Sess., 190 ff.

lish military tribunals to try and punish ordinary civilian offenders.[20]

Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. *Ex parte Quirin*, *supra*, 317 U. S. at 19. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See *Ex parte Milligan*, 4 Wall. 2; *Chambers* v. *Florida*, 309 U. S. 227. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.

Military tribunals have no such standing. For as this Court has said before: ". . . the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Dow* v. *Johnson*, 100 U. S. 158, 169. Congress prior to the time of the enactment of the Organic Act had only once authorized the supplanting of the courts by military tribunals. Legislation to that effect was enacted immediately after the South's unsuccessful attempt to secede from the Union. Insofar as that legislation applied to the Southern States after the war was at an end it was challenged by a series of Presidential vetoes as vigorous as any in the coun-

[20] Even as late as 1937 when the War Department promulgated regulations concerning the employment of troops in aid of civil authorities, it was aware of this tradition. A. R. 500-50, ¶ 7e stated: " . . . Persons not normally subject to military law, taken into custody by the military forces incident to the use of troops contemplated by these regulations, should be turned over to the civil authorities. Punishment in such cases belongs to the courts of justice and not to the armed forces." But cf. A. R. 500-50, ¶ 8.

try's history.[21] And in order to prevent this Court from passing on the constitutionality of this legislation Congress found it necessary to curtail our appellate jurisdiction.[22] Indeed, prior to the Organic Act, the only time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Ex parte Milligan*, 4 Wall. 2, 124-125.

We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military

[21] In one of these vetoes President Johnson said: "The trials having their origin under this bill are to take place without the intervention of a jury and without any fixed rules of law or evidence. The rules on which offenses are to be 'heard and determined' by the numerous agents are such rules and regulations as the President, through the War Department, shall prescribe. No previous presentment is required nor any indictment charging the commission of a crime agaist the laws; but the trial must proceed on charges and specifications. The punishment will be, not what the law declares, but such as a court-martial may think proper; and from these arbitrary tribunals there lies no appeal, no writ of error to any of the courts in which the Constitution of the United States vests exclusively the judicial power of the country." Messages and Papers of the Presidents, Richardson, Vol. VI, 399. In another he said: "It is plain that the authority here given to the military officer amounts to absolute despotism. But to make it still more unendurable, the bill provides that it may be delegated to as many subordinates as he chooses to appoint, for it declares that he shall 'punish or cause to be punished.' Such a power has not been wielded by any monarch in England for more than five hundred years. . . . This broad principle limits all our functions and applies to all subjects. It protects not only the citizens of States which are within the Union, but it shields every human being who comes or is brought under our jurisdiction. We have no right to do in one place more than in another that which the Constitution says we shall not do at all." *Id.*, pp. 502-503.

[22] In re McCardle, 6 Wall. 318. See also Warren, The Supreme Court in United States History, Vol. 2, 464, 484.

tribunals. Yet the government seeks to justify the punishment of both White and Duncan on the ground of such supposed Congressional authorization. We hold that both petitioners are now entitled to be released from custody.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice MURPHY, concurring.

The Court's opinion, in which I join, makes clear that the military trials in these cases were unjustified by the martial law provisions of the Hawaiian Organic Act. Equally obvious, as I see it, is the fact that these trials were forbidden by the Bill of Rights of the Constitution of the United States, which applies in both spirit and letter to Hawaii. Indeed, the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action.

Abhorrence of military rule is ingrained in our form of government. Those who founded this nation knew full well that the arbitrary power of conviction and punishment for pretended offenses is the hallmark of despotism. See The Federalist, No. 83. History had demonstrated that fact to them time and again. They shed their blood to win independence from a ruler who they alleged was attempting to render the "military independent of and superior to the civil power" and who was "depriving us of the benefits of trial by jury." In the earliest state constitutions they inserted definite provisions placing the military under "strict subordination" to the civil power at all times and in all cases. And in framing the Bill of Rights of the federal Constitution they were careful to make sure that the power to punish would rest primarily with the civil authorities at all times. They believed that a trial by an established court, with an impartial jury, was the only certain way to protect an individual against oppression. The Bill of Rights translated that belief into reality by guaranteeing the observance of jury trials and other basic procedural rights foreign to military proceedings. This supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give

effect to that heritage at all times, that it may be handed down untarnished to future generations.

Such considerations led this Court in *Ex parte Milligan*, 4 Wall. 2, to lay down the rule that the military lacks any constitutional power in war or in peace to substitute its tribunals for civil courts that are open and operating in the proper and unobstructed exercise of their jurisdiction. Only when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be invoked to suspend their functions. Even the suspension of power under those conditions is of a most temporary character. "As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power." *Id.*, 127.

Tested by the *Milligan* rule, the military proceedings in issue plainly lacked constitutional sanction. Petitioner White was arrested for embezzlement on August 20, 1942, by the provost marshal. Two days later he was orally informed of the charges against him. Various motions, including a request for a jury trial and for time to prepare a defense, were overruled. On August 25 he was convicted and sentenced to five years in prison. Petitioner Duncan was accorded similar streamlined treatment by the military. On February 24, 1944, he engaged in a fight with two armed sentries at the Navy Yard at Honolulu. He was promptly tried without a jury in the provost court on March 2 and sentenced to six months at hard labor, despite his plea of self-defense. Both the petitioners were civilians entitled to the full protection of the Bill of Rights, including the right to jury trial.

It is undenied that the territorial courts of Hawaii were open and functioning during the period when the foregoing events took place. Martial law was proclaimed on December 7, 1941, immediately after the attack on Pearl Harbor; provost courts and military commissions were immediately established for the trial of civilians accused of crime. General Orders No. 4. On the next day, December 8, the territorial courts were closed by military order. Thereafter criminal cases of all description, whether involving offenses against federal or territorial law or violations of military orders, were handled in the provost courts and military commissions. Eight days later, however, the military permitted the reopening of the courts for the trial of limited classes of cases not requiring juries or the subpoenaing of witnesses. General

Orders No. 29. On January 27, 1942, further power was restored to the courts by designating them "as agents of the Military Governor" to dispose of civil cases except those involving jury trials, habeas corpus and other specified matters and to exercise criminal jurisdiction in limited types of already pending cases. General Orders No. 57. Protests led to the issuance of General Orders No. 133 on August 31, 1942, expanding the jurisdiction of civil courts to cover certain types of jury trials. But General Orders No. 135, issued on September 4, 1942, continued military jurisdiction over offenses directed against the Government or related to the war effort. Proclamations on February 8, 1943, provided that the jurisdiction of the courts was to be reestablished in full except in cases of criminal and civil suits against persons in the armed forces and except for "criminal prosecutions for violations of military orders." These proclamations became effective on March 10, together with a revised code of military orders. Martial law was finally lifted from Hawaii on October 24, 1944.

There can be no question but that when petitioners White and Duncan were subjected to military trials on August 25, 1942, and March 2, 1944, respectively, the territorial courts of Hawaii were perfectly capable of exercising their normal criminal jurisdiction had the military allowed them to do so. The Chief Justice of the Supreme Court of Hawaii stated that after the month of April, 1942, he knew of "no sound reason for denial of trial by jury to civilians charged with criminal offense under the laws of the Territory." The Governor of the Territory also testified that the trial of civilians before military courts for offenses against the laws of the Territory was unnecessary and unjustified by the conditions in the Territory when petitioner White was charged with embezzlement in August, 1942. In short, the Bill of Rights disappeared by military fiat rather than by military necessity.

Moreover, there is no question here as to the loyalty of the Hawaiian judiciary or as to the desire and ability of the judges to cooperate fully with military requirements. There is no evidence of disorder in the community which might have prevented the courts from conducting jury trials. As was said in the *Milligan* case, p. 127, "It is difficult to see how the *safety* of the country required martial law in Indiana [Hawaii]. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no

wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law." Thus, since the courts were open and able to function, the military trials of the petitioners were in violation of the Constitution. Whether, if the courts had been closed by necessity, the military could have tried the petitioners or merely could have held them until the courts reopened is a constitutional issue absent from these cases.

The so-called "open court" rule of the *Milligan* case, to be sure, has been the subject of severe criticism, especially by military commentators. That criticism is repeated by the Government in these cases. It is said that the fact that courts are open is but one of many factors relevant to determining the necessity and hence the constitutionality of military trials of civilians. The argument is made that however adequate the "open court" rule may have been in 1628 or 1864 it is distinctly unsuited to modern warfare conditions where all of the territories of a warring nation may be in combat zones or imminently threatened with long-range attack even while civil courts are operating. Hence if a military commander, on the basis of his conception of military necessity, requires all civilians accused of crime to be tried summarily before martial law tribunals, the Bill of Rights must bow humbly to his judgment despite the unquestioned ability of the civil courts to exercise their criminal jurisdiction.

The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.

The untenable basis of this proposed reversion back to unlimited military rule is revealed by the reasons advanced in support of the reasonableness of the military judgment that it was necessary, even though the civil courts were open and fully able to perform their functions, to impose military trials on all persons accused of crime in Hawaii at the time when the petitioners were tried and convicted:

First. According to the testimony of Admiral Nimitz and General Richardson, Hawaii was in the actual theatre of war from December 7, 1941, through the period in question. They stated

that there was at all times a danger of invasion, at least in the nature of commando raids or submarine attacks, and that public safety required the imposition of martial law. For present purposes it is unnecessary to dispute any of such testimony. We may assume that the threat to Hawaii was a real one; we may also take it for granted that the general declaration of martial law was justified. But it does not follow from these assumptions that the military was free under the Constitution to close the civil courts or to strip them of their criminal jurisdiction, especially after the initial shock of the sudden Japanese attack had been dissipated.

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension. If those rights may safely be respected in the face of a threatened invasion no valid reason exists for disregarding them. In other words, the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended. "Martial law [in relation to closing the courts] cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration." *Ex parte Milligan*, *supra*, 127.

Second. Delays in the civil courts and slowness in their procedure are also cited as an excuse for shearing away their criminal jurisdiction, although lack of knowledge of any undue delays in the Hawaiian courts is admitted. It is said that the military "cannot brook a delay" and that "the punishment must be swift; there is an element of time in it, and we cannot afford to let the trial linger and be protracted." This military attitude toward constitutional processes is not novel. Civil liberties and military expediency are often irreconcilable. It does take time to secure a grand jury indictment, to allow the accused to procure and confer with counsel, to permit the preparation of a defense, to form a

petit jury, to respect the elementary rules of procedure and evidence and to judge guilt or innocence according to accepted rules of law. But experience has demonstrated that such time is well spent. It is the only method we have of insuring the protection of constitutional rights and of guarding against oppression. The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws. We would be false to our trust if we allowed the time it takes to give effect to constitutional rights to be used as the very reason for taking away those rights. It is our duty, as well as that of the military, to make sure that such rights are respected whenever possible, even though time may be consumed.

Third. It is further said that the issuance of military orders relating to civilians required that the military have at its disposal some sort of tribunal to enforce those regulations. Any failure of civil courts to convict violators of such regulations would diminish the authority and ability to discharge military responsibilities. This is the ultimate and most vicious of the arguments used to justify military trials. It assumes without proof that civil courts are incompetent and are prone to free those who are plainly guilty. It assumes further that because the military may have the valid power to issue regulations there must be an accompanying power to punish the violations of those regulations; the implicit and final assumption is then made that the military must have power to punish violations of all other statutes and regulations. Nothing is more inconsistent with our form of government, with its distinction between the power to promulgate law and the power to punish violations of the law. Application of this doctrine could soon lead to the complete elimination of civil jurisdiction over crime.

Moreover, the mere fact that it may be more expedient and convenient for the military to try violators of its own orders before its own tribunals does not and should not furnish a constitutional basis for the jurisdiction of such tribunals when civil courts are in fact functioning or are capable of functioning. Constitutional rights are rooted deeper than the wishes and desires of the military.

Fourth. Much is made of the assertion that the civil courts in Hawaii had no jurisdiction over violations of military orders by civilians and that military courts were therefore necessary. Aside from the fact that the civil courts were ordered not to attempt to exercise such jurisdiction, it is sufficient to note that Congress

on March 21, 1942, vested in the federal courts jurisdiction to enforce military orders with criminal penalties. 56 Stat. 173. It is undisputed that the federal court in Hawaii was open at all times in issue and was capable of exercising criminal jurisdiction. That the military refrained from using the statutory framework which Congress erected affords no constitutional justification for the creation of military tribunals to try such violators.

Fifth. Objection is made to the enforcement in civil courts of military orders on the ground that it would subject the military to "all sorts of influences, political and otherwise, as happened in the cases on the east coast in both Philadelphia and Boston" and that "it is inconceivable that the military commander should be subjected for the enforcement of his orders to the control of other agents." This is merely a military criticism of the proposition that in this nation the military is subordinate to the civil authority. It does not qualify as a recognizable reason for closing the civil courts to criminal cases.

Sixth. Further objection is made that the holding of civil trials might interrupt vital work through the attendance as jurors of war workers. This also is too unmeritorious to warrant serious or lengthy discussion. War workers could easily have been excused from jury duty by military order if necessary.

Seventh. The final reason advanced relates to the testimony of military leaders that Hawaii is said to have a "heterogeneous population with all sorts of affinities and loyalties which are alien in many cases to the philosophy of life of the American Government," one-third of the civilian population being of Japanese descent. The court below observed, 146 F. 2d 576, 580, that "Governmental and military problems alike were complicated by the presence in the Territory of tens of thousands of citizens of Japanese ancestry besides large numbers of aliens of the same race. Obviously the presence of so many inhabitants of doubtful loyalty posed a continuing threat to the public security. Among these people the personnel of clandestine landing parties might mingle freely, without detection. Thus was afforded ideal cover for the activities of the saboteur and the spy . . . To function in criminal matters the civilian courts must assemble juries; and citizens of Japanese extraction could not lawfully be excluded from jury panels on the score of race—even in cases of offenses involving the military security of the Territory. Indeed the mere as-

sembling of juries and the carrying on of protracted criminal trials might well constitute an invitation to disorder as well as an interference with the vital business of the moment." The Government adds that many of the military personnel stationed in Hawaii were unaccustomed to living in such a community and that "potential problems" created in Hawaii by racially mixed juries in criminal cases have heretofore been recognized "although, on the whole, it has been found that members of such mixed juries have not acted on a racial basis."

The implication apparently is that persons of Japanese descent, including those of American background and training, are of such doubtful loyalty as a group as to constitute a menace justifying the denial of the procedural rights of all accused persons in Hawaii. It is also implied that persons of Japanese descent are unfit for jury duty in Hawaii and that the problems arising when they serve on juries are so great as to warrant dispensing with the entire jury system in Hawaii if the military so desires. The lack of any factual or logical basis for such implications is clear. It is a known fact that there have been no recorded acts of sabotage, espionage or fifth column activities by persons of Japanese descent in Hawaii either on or subsequent to December 7, 1941. There was thus no security reason for excluding them from juries, even making the false assumption that it was impossible to separate the loyal from the disloyal. And if there were problems arising from the use of racially mixed juries, elimination of all jury trials was hardly a reasonable or sensible answer to those problems. Especially deplorable, however, is this use of the iniquitous doctrine of racism to justify the imposition of military trials. Racism has no place whatever in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose, military or otherwise. It can only result, as it does in this instance, in striking down individual rights and in aggravating rather than solving the problems toward which it is directed. It renders impotent the ideal of the dignity of the human personality, destroying something of what is noble in our way of life. We must therefore reject it completely whenever it arises in the course of a legal proceeding.

The reasons here advanced for abandoning the "open court" rule of the *Milligan* case are without substance. To retreat from that rule is to open the door to rampant militarism and the

glorification of war, which have destroyed so many nations in history. There is a very necessary part in our national life for the military; it has defended this country well in its darkest hours of trial. But militarism is not our way of life. It is to be used only in the most extreme circumstances. Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, *supra*, 120-121.

Mr. Chief Justice STONE, concurring.

I concur in the result.

I do not think that "martial law", as used in § 67 of the Hawaiian Organic Act, is devoid of meaning. This Court has had occasion to consider its scope and has pointed out that martial law is the exercise of the power which resides in the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety. *Luther* v. *Borden*, 7 How. 1, 45. It is a law of necessity to be prescribed and administered by the executive power. Its object, the preservation of the public safety and good order, defines its scope, which will vary with the circumstances and necessities of the case. The exercise of the power may not extend beyond what is required by the exigency which calls it forth. *Mitchell* v. *Harmony*, 13 How. 115, 133; *United States* v. *Russell*, 13 Wall. 623, 628; *Raymond* v. *Thomas*, 91 U. S. 712, 716; *Sterling* v. *Constantin*, 287 U. S. 378, 400, 401. Any doubts that might be entertained that such is the true limit of martial law in this case are put at rest by § 67 of the Hawaiian Organic Act, which, "in case of rebellion or invasion, or imminent danger thereof", authorizes martial law only "when the public safety requires it."

The Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity of martial law, and in adapting it to the need. Cf. *Hirabayashi* v. *United States*, 320 U. S. 81. But executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency. In the substitution of martial law controls for the ordinary civil processes, "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling* v. *Constantin*, *supra*, 401.

I take it that the Japanese attack on Hawaii on December 7, 1941, was an "invasion" within the meaning of § 67. But it began and ended long before these petitioners were tried by military tribunals in August 1942 and February 1944. I assume that there was danger of further invasion of Hawaii at the times of those trials. I assume also that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts. But the record here discloses no such conditions in Hawaii, at least during the period after February, 1942, and the trial court so found. After closing places of amusement, and after closing the civil courts on December 8, 1941, the military authorities, on December 24, 1941, ordered places of amusement to be opened. On January 27, 1942, they permitted the courts to exercise their normal functions except as to jury trials and the issuance of writs of habeas corpus. On February 4, 1942, they authorized the sale of liquor at bars.

The full record in this case shows the conditions prevailing in Hawaii throughout 1942 and 1943. It demonstrates that from February, 1942 on, the civil courts were capable of functioning, and that trials of petitioners in the civil courts no more endangered the public safety than the gathering of the populace in saloons and places of amusement, which was authorized by military order. I find nothing in the entire record which would fairly suggest that the civil courts were unable to function with their usual efficiency at the times these petitioners were tried, or that their trial by jury in a civil court would have endangered good order or the public safety. The Governor of Hawaii and the Chief Justice of the Hawaiian Supreme Court testified to the con-

trary. The military authorities themselves testified and advanced no reason which has any bearing on public safety or good order for closing the civil courts to the trial of these petitioners, or for trying them in military courts. I can only conclude that the trials and the convictions upon which petitioners are now detained, were unauthorized by the statute, and without lawful authority.

We have no occasion to consider whether the arrest and detention of petitioners by the military authorities, pending their delivery to the civil authorities for trial, would have been lawful. The judgment of the Circuit Court of Appeals should be reversed and the petitioners discharged from custody forthwith.

Mr. Justice BURTON, with whom Mr. Justice FRANKFURTER concurs, dissenting.

With the rest of this Court I subscribe unreservedly to the Bill of Rights. I recognize the importance of the civil courts in protecting individual rights guaranteed by the Constitution. I prefer civil to military control of civilian life and I agree that in war our Constitution contemplates the preservation of the individual rights of all of our people in accordance with a plan of constitutional procedure fitted to the needs of a self-governing republic at war.

Our Constitution expressly provides for waging war, and it is with the constitutional instruments for the successful conduct of war that I am concerned. I recognize here, as elsewhere, the constitutional direction that our respective branches of the Government do not exceed their allotted shares of authority. The courts, as well as our other agencies of the Government, accordingly owe a constitutional obligation not to invade the fields reserved either to the people, the states, or the other coordinate branches of the Government. The courts have an obligation to help define and protect the discretion with which the people have invested their legislative and executive representatives. Within their proper spheres, the robust strength and freedom of action allowed to the policy making and policy executing agencies of our Government are as vital to the success of our great experiment in securing "the bless-

ings of liberty to ourselves and our posterity" as are the checks and balances which have been imposed upon our representatives. It is in the application of these views to the cases before us that I am obliged to dissent from the majority of this Court and to sound a note of warning against the dangers of over-expansion of judicial control into the fields allotted by the Constitution to agencies of legislative and executive action.

The controlling facts in the cases before us are the extraordinary conditions created by the surprise Japanese invasion by air of Pearl Harbor on December 7, 1941. Visualizing the devastating success of that attack and the desperate conditions resulting from it, the primary question is what discretionary action by the executive branch of our Government, including the Army and Navy, was permissible on that day and in the period following it. Pearl Harbor and the Hawaiian Islands were the key to America's defenses in the Pacific. The attack of December 7th destroyed more of America's naval forces than our Government felt it safe to announce. America's first line of defense was pierced. The attack demonstrated that it was part of a carefully planned major military operation against not only Hawaii but the United States. Presumably it would be pressed further. It might well be followed by a land invasion of the Islands and by aerial attacks upon their centers of population.[1]

Handicapped by major losses of air and sea power, the commander of this isolated outpost was faced with imminent danger

[1] Admiral Chester W. Nimitz, Commander in Chief of the Pacific Fleet, who assumed naval command in the Territory of Hawaii December 18, 1941, testified that the Hawaiian area constituted the only base for the Navy in the Pacific ocean at that time and that throughout the war until the last Japanese carrier was destroyed, a Japanese surprise carrier attack on the Islands was within the enemy's capabilities. While invasion by sea borne troops in sufficient number to seize a beach head was not probable, invasion by submarine commando raiders and espionage parties was imminent and constant. Impending Lieutenant General Robert C. Richardson, Jr., Commanding General of the Central Pacific Area, who assumed command of the Hawaiian Department on June 1, 1943, testified that the Islands were within the theater of operations of the Pacific ocean area and that the Islands were the keystone of the defense of the western coast of our country. He testified that the Japanese fleet in April, 1944, was still capable of making a surprise attack upon Oahu by the use of air or undersea craft and that Pearl Harbor was the most attractive target for the enemy because it was the base of the Pacific fleet. He said that it was likely that Japan would take the risk of launching an attack because of the attractiveness of the target and the considerable damage that might be inflicted. He pointed out that the probability of night attacks through the use of submarines and parties

of further invasions under conditions calling for a desperate defense of the Islands. The Islands suddenly had become the focal point of a major action which converted them into an

sent ashore to attack important installations was increased by the presence of disloyal individuals among the population of the Islands. The successes of our fleet had not removed the imminent danger of invasion because these successes made it more imperative for the enemy to repeat its former invasion of the Islands. He further testified that the discharge of his responsibility for military security required a method of enforcement of military security regulations which was prompt and subject to his immediate control and authority and that under martial law the provost courts provided such a method of enforcement. He testified that a military trial for such an offense as that of Duncan in attacking the Pearl Harbor Navy Yard sentries was necessary in order to uphold the authority of military sentries charged with important military duties. He also gave as his opinion that military necessity required trial of White's offense in a military tribunal in August of 1942 at which time the Japanese successful military offensive still continued. In addition to the occupation of Hong Kong, the Malay Peninsula, Singapore, the Dutch East Indies, and bases in New Guinea, the Japanese had successfully occupied our own territories of Guam and Wake which, with Midway, constituted the Island chain connecting Hawaii with the Philippines which themselves were soon occupied. The enemy's occupation of the Solomon Islands, including Tulagi and Guadalcanal, gave the enemy advance air and naval bases for offensive operations against our South Pacific supply line and the north coast of Australia. Biennial Report of the Chief of Staff of the United States Army to the Secretary of War (1943) 14 (House Doc. 288, 78th Cong., 1st Sess.); McInnis, *The War, Third Year* (1942) 238.

Early in May, 1942, one Japanese attempt to extend enemy control southeastward along the borders of the Coral Sea with the ultimate objective of an attack on Australia, was repulsed in the Battle of the Coral Sea. The Japanese offensive, however, continued. In early June the Japanese attempt to occupy Midway Island preliminary to an invasion of Hawaii was thwarted in the Battle of Midway. At the same time, however, Japanese forces occupied our territory of Attu, Agattu and Kiska in the Aleutian Islands. Biennial Report, *supra*, p. 30. (These islands were not recovered until May, 1943. Biennial Report, *supra*, p. 31.) Japanese advances in New Guinea continued during the summer of 1942 and by September, 1942, had forced Allied ground forces back to within 30 miles of Port Moresby, a gateway to Australia. Biennial Report, *supra*, p. 14. On August 7 a landing was made on Guadalcanal by United States forces. For a time it did not appear that the effort to wrest this crucial island from the Japanese could succeed. A strong Japanese attempt to recapture Guadalcanal was beaten off as late as November 16, 1942. Not until early in 1943 was enemy resistance on Guadalcanal overcome. *Ibid.* Even then our forces had only succeeded in checking the enemy's offensive and had not launched their own offensives or ousted the enemy from any American territory. The American offensive in the Central Pacific did not begin until a year later with the invasion of the Gilbert Islands in November, 1943, followed by invasion of the Marshall Islands in January, 1944, and the invasion of the Mariana Islands in July, 1944. Biennial Report of the Chief of Staff of the United States Army to the Secretary of War (1945) 69. Our forces landed on Guam on July 21 and resistance ceased on August 10. By that time our forces in the Southwest Pacific under General MacArthur had reduced or by-passed the enemy's footholds in New Guinea and the way was prepared for the Battle of the Philippines which began with the landing on Leyte on October 20, 1944. *Id., p. 25 et seq.* The "Battle of the Bulge," in the Ardennes, was fought and won at high cost in December and January, 1944-45. *Id.*, p. 44.

outpost of critical military importance to the world in general and to the United States in particular. Their invasion and possible capture overshadowed every other consideration. The Islands were a white-hot center of war ready to burst into flames.

Military attack by air, sea and land was to be expected. The complete disregard of international law evidenced by the first attack and the possible presence on the Islands of many Japanese collaborators gave warning that the enemy's next move might take the form of disastrous sabotage and terrorism among civilians. The extraordinary breach of international law evidenced by the attack made it essential to take extraordinary steps to protect the Islands against subversive action that might spring from deeply laid plans as secret, well aimed, and destructive as the original attack.

On December 7 and in the period immediately following, every inch of the Territory of Hawaii was like a frontier stockade under savage attack with notice that such attack would not be restrained by the laws of civilized nations.[2] Measures of defense had to be taken on the basis that anything could happen. The relation of the Constitution of the United States to such a situation is important. Of course, the Constitution is not put aside. It was written by a generation fresh from war. The people established a more perfect union, in part, so that they might the better defend themselves from military attack. In doing so they centralized far more military power and responsibility in the Chief Executive than previously had been done. The Constitution was built for rough as well as smooth roads. In time of war the nation simply changes gears and takes the harder going under the same power.

The conduct of war under the Constitution is largely an executive function. Within the field of military action in time of war, the executive is allowed wide discretion. While, even in the conduct of war, there are many lines of jurisdiction to draw between the proper spheres of legislative, executive and judicial action, it seems clear that at least on an active battle field, the executive discretion to determine policy is there intended by the Constitution to be supreme. The question then arises: What is

[2] "Hawaii constitutes the main Pacific outpost of the United States, and accordingly must be regarded as a fortress to whose defense the entire population of the Islands is committed. Its manpower and its economic resources must be subject to a single ultimate control." General Orders No. 133, by order of the Military Governor of the Territory of Hawaii, August 31, 1942.

a battle field and how long does it remain one after the first barrage?

It is well that the outer limits of the jurisdiction of our military authorities is subject to review by our courts even under such extreme circumstances as those of the battle field. This, however, requires the courts to put themselves as nearly as possible in the place of those who had the constitutional responsibility for immediate executive action. For a court to recreate a complete picture of the emergency is impossible. That impossibility demonstrates the need for a zone of executive discretion within which courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight. The nature of judicial authority is largely negative as contrasted with the generally positive nature of executive authority, and it is essential that the opportunity for well directed positive action be preserved and vigorously used if the Government is to serve the best interests of the people.

For this Court to intrude its judgment into spheres of constitutional discretion that are reserved either to the Congress or to the Chief Executive, is to invite disregard of that judgment by the Congress or by executive agencies under a claim of constitutional right to do so. On the other hand, this Court can contribute much to the orderly conduct of government, if it will outline reasonable boundaries for the discretion of the respective departments of the Government, with full regard for the limitations and also for the responsibilities imposed upon them by the Constitution.

It is important to approach the present cases with a full appreciation of the responsibility of the executive branch of the Government in Hawaii under the invasion which occurred on December 7, 1941. The question is not shall the Constitution apply under such circumstances? The question is with what authority has the Constitution and laws of this country vested the official representatives of the people upon whom are placed the responsibilities of leadership under those extraordinary circumstances?

The vital distinction is between conditions in "the theater of actual military operations" and outside of that theater.[3] In this

[3] "Again, in the place where actual military operations are being conducted, the ordinary rights of citizens must yield to paramount military ne-

case Hawaii was not only in the theater of operations, it was under fire. If the Territory of Hawaii, on that date and during the immediately succeeding period, is recognized as the battle field it was, then under such circumstances of invasion and threat of immediate further invasion, the actions taken by the Governor of Hawaii and by the Commanding General of the Hawaiian De-

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cessity. This was conceded in Milligan's case [4 Wall. 2, 127], where it was said in the prevailing opinion:

"'If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.'" Address by Hon. Charles E. Hughes, *War Powers Under the Constitution* (1917) XLII Reports of American Bar Association 232, 244.

In the present cases the records have incorporated the following testimony of Lt. Gen. Robert C. Richardson, Jr., U. S. A., Commanding General of the Central Pacific Area:

"A. . . . this whole area under the command of the Commander-in-Chief of the Pacific Ocean Area, Admiral Nimitz, is an active theatre of war, and within that theatre of war is the theatre of operations, of which the Hawaiian Department is a part.

"Q. Will you explain what you mean, from the military viewpoint, by the terms 'active theatre of war' and 'theatre of operations?'

"A. Well, an active theatre of war is that area which is or may become actively involved in the conduct of the war. A theatre of operations is that part of an active war theatre which is needed for the operations either offensively or defensively, according to the missions assigned or a combination of the missions; and it includes also the administrative agencies which are necessary for the conduct of those operations."

. . . . . .

"Q. Is there any military parlance that indicates that portion of the earth's surface where the fighting actually takes place?

"A. Yes.

"Q. What is that called?

"A. Combat zone.

"Q. You would not call Hawaii a combat zone?

"A. Yes, I would, because the theatre of operations or the combat zone also includes that part assigned to your mission, whether it be offensive or defensive. We are on the defensive mission here in Oahu, whereas the fleet operates offensively from here, and some of our troops which are based here operate offensively from this base. But concurrently with its mission as an offensive base, we have a very decided mission here as a defensive base, and that defensive mission designates or characterizes it as a part of the combat zone.

"Q. Then a combat zone can be an area where no shooting is going on at all?

"A. Oh, yes; oh, yes.

"Q. No real destruction of life or property

"A. Absolutely. . . .

"Q. Well, do you have *any* term, military term, that precisely fits the place where life and property is actually being destroyed as a resut of organized warfare?

"A. Yes, the battle."

partment, supported by the President of the United States, in suspending the writ of habeas corpus, declaring martial law and vesting in such Commanding General for those first several days the powers normally exercised by the Governor and by the judicial officers and employees of the Territory (at least to the extent that would be involved in the present cases if they had arisen at that time), were within the executive discretion of the officials who authorized the action. The actual presence of battle in a community creates a substantially different condition from that which exists in other parts of a nation at war. That conditions of war and the means of meeting its emergencies were within the contemplation of the Constitution of the United States is shown by the broad authority vested in the President of the United States as Chief Executive and as Commander in Chief of the Army and Navy and in the war powers of the Congress and the Chief Executive to preserve the safety of the nation in time of war. The present cases arose in a Territory of the United States, directly under the care and jurisdiction of the Federal Government. That conditions of actual invasion were contemplated by Congress in the Organic Act of Hawaii is seen from the provision quoted in the majority opinion to the effect that the Governor

> "whenever it becomes necessary . . . [the Governor] may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, *in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.*" § 67 of the Hawaiian Organic Act, 31 Stat. 153, 48 U. S. C. § 532. (Italics supplied.)

The Governor's proclamation demonstrates that, in so far as the discretion lay in him, he recognized in those days that a condition had arisen calling for the exercise of these powers. The proclamation of December 7, 1941, in its every word is the best evidence of the exercise of this discretion and speaks for itself:

"Whereas, it is provided by Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, that, whenever it becomes necessary, the Governor of that territory may call upon the commander of the military forces of the United States in that territory to prevent invasion; and

"Whereas, it is further provided by the said section that the governor may in case of invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus and place the territory under martial law; and

"Whereas, the armed forces of the Empire of Japan have this day attacked and invaded the shores of the Hawaiian Islands; and

"Whereas, it has become necessary to repel such attack and invasion; and

"Whereas, the public safety requires;

"Now, Therefore, I, J. B. Poindexter, Governor of the Territory of Hawaii, do hereby announce that, pursuant to said section, I have called upon the Commanding General, Hawaiian Department, to prevent such invasion;

"And, pursuant to the same section, I do hereby suspend the privilege of the writ of habeas corpus until further notice;

"And, pursuant to the same section, I do hereby place the said territory under martial law;

"And I do hereby authorize and request the Commanding General, Hawaiian Department, during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor;

"And I do further authorize and request the said Commanding General, Hawaiian Department, and those subordinate military personnel to whom he may delegate such authority, during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this territory and of the counties and cities therein, and such other and further powers as the emergency may require;

"And I do require all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and in spirit, such proclamations, rules, regulations and orders, as the Commanding General, Hawaiian Department, or his subordinates, may issue during the present emergency."

This action was communicated by him to the President and the President's decision upon his action was made known in accordance with the Organic Act of Hawaii in the following messages:

Dec. 7, 1941

"The President the White House
Washington D.C

I Have Today Declared Martial Law Throughout the Territory of Hawaii and Have Suspended the Privilege of the Writ of Habeas Corpus Period Your Attention Is Called to Section Sixty Seven of the Hawaiian Organic Act for Your Decision on My Action

POINDEXTER"

December 9, 1941

"Honorable Joseph B. Poindexter
Governor, Territory of Hawaii,
Honolulu, Hawaii.

Your Telegram of December Seventh Received and Your Action in Suspending the Writ of Habeas Corpus and Placing the Territory of Hawaii Under Martial Law in Accordance with U. S. C., Title 48, Section 532 Has My Approval.

FRANKLIN D. ROOSEVELT"

The discretion to determine within reasonable limits the existence of the emergency of war contemplated by the Organic Act must be an executive discretion. Under the circumstances now generally known as to what took place at Pearl Harbor on December 7 and the seriousness of the threat which that attack carried with it, not only to the people in the Territory of Hawaii but to the United States of America, I am unable to find that on that day the President and the Governor exceeded their constitutional authority in taking the steps evidenced by the foregoing declaration of policy or that the Commanding General exceeded his authority in carrying out those instructions through the issuance of his proclamation pursuant thereto on December 7, 1941.[4]

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[4] "To the People of Hawaii:

"The military and naval forces of the Empire of Japan have attacked and attempted to invade these islands.

"Pursuant to section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, the Governor of Hawaii has called upon me, as commander of the military forces of the United States in Hawaii, to prevent such invasion; has suspended the privilege of the writ of habeas corpus; has placed the Territory under martial law; has authorized and requested me and my subordinates to exercise the powers normally exercised by the governor and by subordinate civil officers; and has required all persons within the Territory to obey such proclamations, orders, and regulations as I may issue during the present emergency.

"I announce to the people of Hawaii, that, in compliance with the above requests of the Governor of Hawaii, I have this day assumed the position of military governor of Hawaii, and have taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense.

"All persons within the Territory of Hawaii, whether residents thereof or not whether citizens of the United States or not, of no matter what race or

The findings of fact, express and implicit in these prompt and forthright expressions of executive leadership, leave no room for doubt as to the genuineness of the emergency and of the conscientious determination of these officials to act so as to meet it. At the same time, the appreciation felt by the Commanding General of his responsibility to the civilians on the Islands is shown in his three concluding paragraphs. Starting with the propriety of that battle field regulation in the presence of disastrous invasion, the question resolves itself solely to one of when and to what extent the constitutional executive discretion to continue these orders can or should be held by this Court to have been exceeded. Once the Islands are visualized as a battle field under actual invasion, threatened with further invasion, and invaluable to the enemy as a base from which to attack the continental United States, the situation is completely changed from that of an ordinary civilian community. Under conditions likely to disregard even the laws of civilized warfare, the island population was threatened with immediate destruction. It thus became necessary to organize and protect that population against imminent danger from bombing, fire, disruption of water and food supply, disease and all the other incidents of modern warfare. The limited area, limited garrison and great isolation of the Islands put a premium on the efficiency of its civilian defense and on the integration of it with the military defense. All activity was subordinated to executive control as

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nationality, are warned that by reason of their presence here they owe during their stay at least a temporary duty of obedience to the United States, and that they are bound to refrain from giving, by word or deed, any aid or comfort to the enemies of the United States. Any violation of this duty is treason, and will be punished by the severest penalties.

"The troops under my command, in putting down any disorder or rebellion and in preventing any aid to the invader, will act with such firmness and vigor and will use such arms as the accomplishment of their tasks may require.

"The imminence of attack by the enemy and the possibility of invasion make necessary a stricter control of your actions than would be necessary or proper at other times. I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects.

"In order to assist in repelling the threatened invasion of our island home, good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. *Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function.*

"Pending further instructions from this headquarters the Hawaii Defense Act and the Proclamations of the Governor of Hawaii heretofore issued thereunder shall continue in full force and effect." (Italics supplied.)

the best constitutional safeguard of the civilian as well as the military life.

That in such a case there must be restoration of civilian control is clear. It is equally clear that there must be limits to the extent to which the executive discretion constitutionally may delay such restoration. In the first instance, however, there is a period, bearing a reasonable relation to the original emergency, during which it must be within the discretion of the executive agencies of the Government to decide when and how to restore the battle field to its peace time controls.

In view of the responsibility placed upon the executive branch of the Government and especially upon its armed forces in time of invasion and threatened invasion, it is essential that that branch of the Government have freedom of action equal to its needs. At the center of invasion, military control is the proper control to be applied, subject to provisions of the Constitution, treaties and laws of the United States applicable to a battle field. On December 7, 1941, I believe that the facts of the invasion and threatened further invasion amply established such a condition and justified at the time the military control established on that basis throughout the Islands.

Whether or not from the vantage post of the present this Court may disagree with the judgment exercised by the military authorities in their schedule of relaxation of control is not material unless this Court finds that the schedule was so delayed as to exceed the range of discretion which such conditions properly vest in the military authorities.

It is all too easy in this postwar period to assume that the success which our forces attained was inevitable and that military control should have been relaxed on a schedule based upon such actual developments. In fact, however, even now our Chief of Staff in his report to the Secretary of War as of June 30, 1945, reminds us that in "the black days of 1942 when the Japanese conquered all of Malaysia, occupied Burma, and threatened India, while the German armies approached the Volga and the Suez. . . . Germany and Japan came so close to complete domination of the world that we do not yet realize how thin the thread of Allied survival had been stretched." Biennial Report of the Chief of Staff of the United States Army (1945) 1.[5] Those were critical days when

[5] See also the letters of General George C. Marshall, Chief of Staff of September 25 and 27, 1944, to Governor Thomas E. Dewey, emphasizing the

the United States could afford no military mistakes and when the safety and control of the Hawaiian key to the Pacific was essential. It was the responsibility of our military commanders not only to do the right thing in the interests of safety but to take no chances of error or surprise. It was the obligation of our military commanders to insure safety rather than to risk it. Acting as they were in the "fog of war," they were entitled to a wide range of discretion if they were to meet the obligations imposed upon them. It is not justifiable to tear Hawaii out from the context of the war as a whole. Our military policy there, as elsewhere, had to be guided by its relation to the global war.

Under these circumstances it is conceivable that the military authorities might have tried to continue complete military control in effect for a substantial period with a view to later relaxation of all such control when conditions made it obvious that there was no longer a need for any controls. Such a course was not attempted here. The Commanding General of the Hawaii Department followed from the beginning the policy foreshadowed in his original proclamation. He restored civilian control of civilian activities wherever and whenever he felt that a partial restoration of it was in the public interest. In the meantime he had the primary duty of maintaining law and order and of fostering civilian activities as much as possible. Perhaps he could have arrested and detained individuals charged with violation of laws or regulations and held them for later trial by civilian courts. However, in view of the size of the population and the necessarily limited facilities for large scale detentions, he owed an equal duty to dispose promptly of violations of the law. To this end, law and order was enforced and justice was administered in the first instance through military tribunals. With evident care and with substantial rapidity the military control was relaxed gradually, in instance after instance, until the administration of justice over civilians was restored completely to civilian administration when, on October 19, 1944, the President issued a proclamation effective October 24, terminating martial law and directing the Governor to issue a proclamation accordingly.

...gic military consequences which at that date would follow disclosure that the United States had "broken" the Japanese secret message code. Hearings before Joint Committee of Congress to Investigate the Pearl Harbor Attack, 79th Cong., 2d Sess. (1946), p —.

There is set forth in the margin[6] a summary of the steps by which this relaxation was accomplished. As early as December

[6] Dec. 7, 1941. Governor Poindexter invoked Section 67 of the Hawaiian Organic Act and by proclamation placed the Territory under martial law; suspended the privilege of the writ of habeas corpus; and delegated to the Commanding General of the Hawaiian Department of the United States Army not only all of his powers as Governor but also all of the "powers normally exercised by judicial officers . . . of this territory . . . during the present emergency and until the danger of invasion is removed."

Dec. 7, 1941. By radio the Governor of Hawaii notified the President of the United States that he had placed the Territory under martial law and suspended the writ of habeas corpus.

Dec. 7, 1941. The Commanding General, Walter C. Short, referring specifically to Governor Poindexter's proclamation of the same date, himself issued a proclamation notifying the people of Hawaii that he had assumed the position of "Military Governor of Hawaii" and had taken over the government of Hawaii.

Dec. 7, 1941. The Military Governor of Hawaii issued General Orders No. 4 by which he set up a system of military courts to try civilians for violations of the laws of the United States, the laws of the Territory, and "rules, regulations, orders, or policies" of the military authorities. The procedure prescribed for these military courts was that of special and summary courts martial.

Dec. 8, 1941. The courts of the Territory were closed by the Chief Justice of the Supreme Court of Hawaii under the direction of the Commanding General.

Dec. 9, 1941. The President approved by radio, the action of the Governor suspending the writ and placing the Territory under martial law in accordance with the Organic Act of Hawaii.

Dec. 16, 1941. By General Orders No. 29 the complete closing of the courts was partly relaxed. The relaxation affected only civil matters not involving jury trials.

Dec. 17, 1941. General Short transferred to General Emmons his powers as Military Governor of Hawaii.

Jan. 27, 1942. The Military Governor, by General Orders No. 57, modified further the restrictions on court proceedings. By this order the courts of the Territory were authorized to exercise certain of the powers normally exercised by them during the existence of civil government. With certain exceptions, the courts were restored to their respective functions prior to martial law, "as agents of the Military Governor." The criminal courts could not, under the order, summon a grand jury; and neither the criminal nor civil courts could grant a jury trial, or at any time grant a writ of habeas corpus.

Aug. 31, 1942. General Orders No. 133 extended the jurisdiction of the courts to jury trials. This order stated in Sec. I: " . . . Martial law has been declared and the emergency which called it forth still prevails. . . . It is to be understood that the relaxation herein specified is intended to return to the courts criminal prosecutions and civil litigation to the extent that war conditions permit. However, this action is experimental in nature and the Military Governor reserves the right further to limit the jurisdiction of the courts or to close them entirely, if that course shall be necessary."

Sept. 4, 1942. General Orders No. 135 enumerated the criminal offenses involving crimes against the Government or related to the war effort, in respect to which the courts were not authorized to exercise jurisdiction.

Feb. 8, 1943. Governor Stainback, who succeeded Governor Poindexter, issued a public proclamation providing that, although martial law and suspension of the privilege of the writ of habeas corpus were to remain in effect,

16, 1941, the courts were reopened in so far as they applied to civil matters not involving jury trials. On January 27, 1942, the restrictions on court procedure were further modified. On August 31, 1942, a general order extended the jurisdiction of the courts to jury trials. Further relaxation occurred from time to time in 1942 and 1943.

It was on August 20, 1942, that the petitioner White was arrested for embezzlement in violation of Chapter 183 of the Revised Laws of Hawaii. On August 25 he was tried and convicted before a provost court, and sentenced to five years' imprisonment, later reduced to four. In so far as the issue relates to his case, and in the light of the evident consideration that the Commanding General was giving to the restoration of civil control to the courts, I am unable to hold as a matter of law that, through not acting more quickly and less cautiously, he violated his constitutional discretion when on December 16, 1941, he authorized the civil courts to open to a limited extent for the trial of limited classes of cases not requiring jury trials or the subpoenaing of witnesses, or when on January 27, 1942, he authorized the civil courts, as agents of the Military Government, to exercise their normal functions except for jury trials, writs of habeas corpus and other specified classes of cases, and when, on August 31, 1942, he extended their jurisdiction to jury trials such as would have

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the Governor and other civil agencies would resume their respective jurisdictions, including criminal and civil proceedings, except for criminal proceedings against members of the armed forces and civil suits against them for acts or omissions in the line of duty and criminal prosecutions for violations of military orders, except as these exceptions might be waived by the Commanding General in any particular case or class of cases.

Feb. 8, 1943. General Emmons, the Military Governor, issued a public proclamation relinquishing to the Governor and other civilian officers of the Territory the functions set forth in the Governor's proclamation.

Mar. 10, 1943. General Emmons issued a revised set of General Orders Nos. 1 to 14, and rescinded General Orders Nos. 1 to 181, issued under prior proclamations. General Orders No. 2 vested provost courts and military commissions with jurisdiction to try any case involving violations by a civilian of "rules, regulations, proclamations, or Orders of the Military or Naval authorities, or of the Military Governor of the Territory of Hawaii, or of the laws of war," and to impose a fine, imprisonment or both. Maximum punishment was to be confinement at hard labor for five years, or a fine of five thousand dollars or both.

Oct. 19, 1944. The President issued Proclamation No. 2627 providing that, effective Oct. 24, 1944, the privilege of the writ of habeas corpus was restored and martial law terminated and directing the Governor to issue a proclamation accordingly.

Oct. 24, 1944. The Governor issued a proclamation which proclaimed that "the privilege of the writ of habeas corpus is restored and that martial law is terminated in the Territory of Hawaii."

applied to the petitioner White. Even on that date, in General Orders No. 133,[7] he found expressly that "martial law has been declared and the emergency which called it forth still prevails."

The petitioner Duncan was convicted on March 2, 1944, of maliciously assaulting and beating two marines on February 24, 1944, with intent to prevent their performance of their duties as sentries at the main gate of the Pearl Harbor Navy Yard. For this offense he was sentenced to six months in jail. At this time civilian agencies had resumed most of their peace time jurisdiction, including criminal and civil proceedings, except for criminal proceedings against members of the armed forces, civil suits against them for acts or omissions in line of duty and criminal prosecutions of violations of military orders. The close relationship of these items to the military functions of the armed forces on the Islands indicates the reasonableness of their exception. Even these exceptions were removed in October, 1944, when martial law was terminated. I find it impossible under these circumstances to hold that the President and the military authorities violated the discretion vested in them to insure the safety of the Islands in time of war, invasion and threatened invasion, in that they failed to terminate martial law so completely before March 2, 1944, that a civilian, who attacked marines on duty as sentries at the main gate of the Pearl Harbor Navy Yard, could insist upon a trial in the local criminal courts as distinguished from the local provost court which had exercised jurisdiction over such cases throughout the Japanese war which was still actively in progress.

Now that the war has been won and the safety of the Islands has been again assured, there is opportunity, in the calm light of peace, for the readjustment of sentences imposed upon civilians and military personnel during the emergency of war and which have not yet expired. It is important, however, that in reviewing the constitutionality of the conduct of our agencies of government in time of war, invasion and threatened invasion, we do not now make precedents which in other emergencies may handicap the executive branch of the Government in the performance of duties allotted to it by the Constitution and by the exercise of which it successfully defended the nation against the greatest attack ever made upon it.

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[7] See Footnotes 2 and 6.

One way to test the soundness of a decision today that the trial of petitioner White on August 25, 1942, before a provost court on a charge of embezzlement and the trial of petitioner Duncan on March 2, 1944, before a similar court on a charge of maliciously assaulting marine sentries were unconstitutional procedures, is to ask ourselves whether or not on those dates, with the war against Japan in full swing, this Court would have, or should have, granted a writ of habeas corpus, an injunction or a writ of prohibition to release the petitioners or otherwise to oust the provost courts of their claimed jurisdiction. Such a test emphasizes the issue. I believe that this Court would not have been justified in granting the relief suggested at such times. Also I believe that this Court might well have found itself embarrassed had it ordered such relief and then had attempted to enforce its order in the theater of military operations, at a time when the area was under martial law and the writ of habeas corpus was still suspended, all in accordance with the orders of the President of the United States and the Governor of Hawaii issued under their interpretation of the discretion and responsibility vested in them by the Constitution of the United States and by the Organic Act of Hawaii enacted by Congress.

In order to recognize the full strength of our Constitution, both in time of peace and in time of war, it is necessary to protect the authority of our legislative and executive officials, as well as that of our courts, in the performance of their respective obligations to help to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity."